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CASES

ARGUED AND DETERMINED

IN THE COURTS OF

Common Pleas & Exchequer Chamber,

AND IN

The House of Lords;

FROM

MICHAELMAS TERM, 1831, TO EASTER TERM, 1832.

BY

JOHN BAYLY MOORE, Esq., AND JOHN SCOTT, Esq.,
OF THE INNER TEMPLE, BARRISTER AT LAW.

VOL. I.

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OF THE
COURT OF COMMON PLEAS,

DURING THE PERIOD COMPRISED IN THIS VOLUME.



The Right Hon. Sir NICHOLAS CONYNTHAM TINDAL,
Knt., Lord Chief Justice.

The Hon. Sir JAMES ALLAN PARK, Knt.

The Hon. Sir STEPHEN GASELEE, Knt.

The Hon. Sir JOHN BARNARD BOSANQUET, Knt.

The Hon. Sir EDWARD HALL ALDERSON, Knt.



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CASES

ARGUED AND DETERMINED

IN THE

Court of Common Pleas.

MICHAELMAS TERM, 2 WILL. IV.

Ex parte FRANKS, In the matter of KEZIA FRANKS, a
Bankrupt.

1831.

THE following case was, by the order of his Honor the Vice Chancellor, submitted to the Judges of this Court for their opinion:—

Joseph Franks, the husband of *Kezia Franks*, who for several years had carried on the trade or business of a china, glass, and earthenware dealer, in *Wickham Street, Portsea*, in the county of *Hants*, was, in 1821, convicted of feloniously having in his possession bank of *England* notes, knowing them to have been forged, and was sentenced to be transported to parts beyond the seas for fourteen years. After sentence, the said *Joseph Franks* was removed to one of the hulks lying in the harbour of *Portsmouth* for the reception of convicts, where he has remained ever since, and where the said *Kezia Franks*, by the permission of the persons in charge of the convicts

The wife of a convicted felon sentenced to transportation beyond the seas for the term of fourteen years, but removed to and confined on board one of the hulks in this country, is liable to be made a bankrupt, if she trade on her own account, although she is in the habit of visiting her husband and holding communications with him during his confinement.

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there, has been in the habit of visiting him and holding occasional communications with him; and, since his conviction, the said *Kesia Franks* has carried on the said trade or business of a china, glass, and earthenware dealer, at *Portsea* aforesaid, for the benefit and support of herself and family.

On the 25th *July*, 1827, a commission of bankrupt was awarded and issued against the said *Kesia Franks*, by the name and description of *Kesia Franks*, late of *Wickham Street*, *Portsea*, in the county of *Hants*, glass and china dealer, dealer and chapman, now a prisoner confined for debt in the *King's Bench* prison, in the county of *Surrey*; and the said *Kesia Franks* has thereupon been found and declared a bankrupt by the commissioners acting under the said commission.

The said *Kesia Franks*, in conducting such business as aforesaid since her husband's conviction, though she never gave out or pretended that she was an unmarried woman, was in the habit of accepting bills of exchange in her own name, and giving the same to persons who gave her credit; and the bills of parcels, receipts, and accounts of and for goods sold to her, were in the name of *Mrs. Kesia Franks*; but it was generally known to the persons with whom she dealt, that she was married, and was continuing to carry on the business for the benefit of herself and family.

Henry Jacobs the younger was the petitioning creditor under the commission, and his debt was on two bills of exchange drawn by one *Lewis Jacobs* for and on the behalf of one *Henry Jacobs*, upon and accepted by the said *Kesia Franks* in her own name; and which said two bills of exchange were afterwards, and before they became due, indorsed to the said *Henry Jacobs* the younger, for a valuable consideration. At the time of taking such bills, the said *Henry Jacobs* the younger did not know that the said *Joseph Franks* (the husband of the said *Kesia Franks*) was a convict on board the hulks, or that he was alive, but

he had notice thereof previous to the time when he petitioned for such commission.

The question for the opinion of the Court was, whether, at the date and suing forth the said commission of bankrupt against the said *Kesia Franks*, on the said 25th July, 1827, the said *Kesia Franks* was a trader, and, as such trader, liable to become bankrupt within the true intent and meaning of the act of Parliament passed in the sixth year of the reign of his late Majesty King George the Fourth, intituled, "An act to amend the laws relating to bankrupts."

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The case came on for argument in the last term.

Mr. Serjeant Jones, for *Henry Jacobs*, the petitioning creditor, submitted that *Kesia Franks*, at the time of suing out the commission against her, was competent to trade, and in a condition to sue and be sued on contracts relating to the carrying on business for the benefit of herself and family, and consequently, that she was liable to be made a bankrupt, within the intent and meaning of the bankrupt laws. Admitting that, since the case of *Marshall v. Batton* (a), a *feme covert* cannot contract and be sued as a *feme sole*, although she be living apart from her husband, and have a separate maintenance secured to her by deed; yet here, as *Franks*, the husband, was convicted of felony, and sentenced to transportation beyond the seas for the term of fourteen years, he must be considered as civilly dead, until the expiration of that period. In *Sparrow v. Carruthers* (b), in an action upon a promissory note given by a woman who kept a public house, for malt supplied, and she proved her coverture; and the plaintiff shewed that her husband had been transported, and that his

(a) 8 Term Rep. 545.

(b) 1 Term Rep. 7, n; S. C. 2 Sir Wm. Bl. 1197.

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time was not yet expired, Mr. Justice *Yates* thought that the transportation suspended the disability; and Lord *Mansfield* said he recollected a similar case before him at *Maidstone*, which he had determined in the same manner: and his Lordship, in giving his opinion in *Corbett v. Poelnitz*, said (a)—“Where a husband is in exile, or has abjured the realm, and credit has been given to the wife alone, justice says she must pay, for the husband cannot be sued. So it is in the case of transportation, though the case is not exactly the same; for there the absence is only temporary, because the husband may come over and be sued afterwards. Why, then, is it so established? Because the wife acts as a single woman, gains credit as such, receives the benefit, and shall be liable to the loss: and where she has an estate to her separate use, in justice she ought to be liable to the extent of it.” The general principle is, that, where a woman has a separate estate, and acts and receives credit as a *feme sole*, she shall be liable as such. In *Walford v. The Duchess de Piennes* (b), where the husband of a married woman, a foreigner, went abroad, but declared his intention of returning to this country in a short time, but did not do so, Lord *Kengon* ruled that the wife was liable for debts contracted in his absence. In the case of *De Gaillon v. L’Aigle* (c), where the husband resided abroad, and the wife traded and obtained credit in this country as a *feme sole*, she was held not to be liable for her own debts, unless she represented herself as a *feme sole*; yet Mr. Justice *Buller* said—“There is another set of cases of a very different nature from those which have been relied on by the defendant, but which are much more applicable to this case. The first of these is the Lady *Belknap’s* case (d). Now, let us see if any sound distinction between that case and this can be maintained. The husband

(a) 1 Term Rep. 8.

(b) 2 Esp. Rep. 554.

(c) 1 Bos. & Pul. 357.

(d) 2 Hen. 4. 7. a.

there was banished, but it is not stated whether he was banished for one year, or for five years, or for life: it was held sufficient that he was in banishment at the time when *Lady Belknap's* contract was made; and I can see but one principle on which the case could have been decided, *viz.* that the rights known to exist in law between husband and wife were not interfered with by allowing the wife to be taken in execution: as the husband was banished (though it be not stated whether for life or not), the matrimonial rights during his banishment were at least suspended:" and Mr. Justice *Heath* said—"The cases of banishment and transportation of the husband are directly in point. Besides, it is for the benefit of the *feme covert* that she should be liable to an action in such a case as this, otherwise she could obtain no credit, and would have no means of gaining her livelihood." In *Carrol v. Blencow* (a), Lord *Alvanley* held that a married woman, whose husband had been transported for seven years, might maintain an action as a *feme sole*, on the ground of the husband having abjured the realm, even although the term of his transportation had expired, for that, if in fact he had not returned, the right of action remained. Although, in *Lewis v. Lee* (b), it was decided that a woman divorced *a mensa et thoro* for adultery, and living separate and apart from her husband, could not be sued as a *feme sole*, yet it was on the ground that a divorcee for adultery does not destroy the relation of marriage, but merely suspends for a time some of the obligations arising out of that relation; and Lord Chief Justice *Abbott* referred to *Hatchett v. Baddeley* (c), where Mr. Justice *Blackstone* said—"That a *feme covert* cannot be sued alone, unless in the known excepted cases of abjuration, exile, and the like, where the husband is considered as dead, and the woman as a widow, or else as divorced *a vinculo*." In *Jewson v.*

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(a) 4 Esp. Rep. 27.

5 Dow. & Ry. 98.

(b) 3 Barn. & Cress. 291; S. C.

(c) 2 Sir W. Bl. 1082.

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Read (a), Lord *Mansfield* admitted that a *feme covert* might plead without her husband, he being transported, on the ground that transportation is a temporary death, and analogous to abjuration of the realm. So, in this case, *Kexia Franks* might sue and be sued; and it is found as a fact in the case, that she carried on trade for the benefit and support of herself and family. Lord *Coke* says (b)—“An abjuration, that is, a deportation for ever into a foreign land, like to profession, is a civil death; and that is the reason that the wife may bring an action, or may be impleaded during the natural life of her husband.” And although he says—“But if the husband, by act of Parliament, have judgment to be exiled but for a time, which some call a relegation, that is no civil death:” yet Mr. *Hargrave*, in a note says (c)—“But though it is not a civil death, yet, for the time, the effect is the same to the wife; and, therefore, it is equally necessary that she should have a right to sue alone;” and he refers to 4 *Viner’s* Abridgment (d) and 1 *Comyns’s* Digest (e) as authorities in support of that proposition.

Mr. Serjeant *Spankie*, *contra*.—In *Marshall v. Rutton*, Lord *Kenyon*, in delivering the judgment of the Court said (f)—“We find no authority in the books to shew that a man and his wife can, by agreement between themselves, change their legal capacities and characters, or that a woman may be sued as a *feme sole*, while the relation of marriage subsists, and she and her husband are living in this kingdom.” That doctrine is founded on policy and good sense, and is now the settled law of the land. In *Corbett v. Poelnitz*, Lord *Mansfield* said (g)—“There is a rule of positive law which is to be adhered to and preferred, though in some particular cases it may seem pro-

(a) Lofft, 142.

(b) Co. Litt. 133 (a).

(c) Note 209.

(d) Page 152.

(e) Page 18, 3rd edit. 23.

(f) 8 Term Rep. 548.

(g) 1 Term Rep. 8.

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ductive of hardship and oppression. By this general rule, a married woman can have no property real or personal. Her contracts are entirely and universally void; for her contracts, even for necessities, are the contracts of her husband: she cannot be sued or be taken in execution." Although exceptions have been made to that rule where the husband is in exile, or has abjured the realm, they cannot apply to a case of transportation for a term of years, especially where the convict remains in this country. Exile and profession are now out of the question; and, by the latter, when a man entered into any religious order, whereby he was shut up from all the common offices of life, it was properly named a civil death. So, in the case of abjuration, the party accused had the privilege of forty days to confess his guilt before the coroner before he took the oath of abjuration, which was, to depart the realm *for ever*. But abjuration can only apply to a case where there is a commutation for the punishment of death on the party being convicted of a capital felony, by transportation for life. In *Sanchez, de Sancto Matrimonii* (a), it is said—" *Homo non potuit exuere uxorem*." Lord Coke says (b)—"A wife is disabled to sue without her husband, as much as a monk is without his sovereign; and yet we read in books, that, in some cases, a wife hath ability to sue and be sued without her husband, for the wife of Sir Robert Bellasp, one of the Justices of the Court of Common Pleas, who was exiled or banished beyond sea, did sue a writ in her own name, without her husband, he being alive; whereof, one said—

' *Ecce modo mirum, quod femina fert breve regis,
Non nominando virum conjunctum robore legis.*'

Lord Coke also refers to *Maltraver's* case. *Sibet B's* case, and *Weyland's* case; and although he states that he

(a) Cap. 9, *De Debito Conjugali*.

(b) Co. Litt. 132. b.

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had cited the resolution in the latter case at large, yet; on reference to the *Rot. Parl.* (a) it appears to have been a case where the wife claimed her own land, she being seized in her own right and entitled to it independently of her husband, by virtue of a fine. So, in *Bellenger's case* (b) the wife sued for her own land, and in *Maitland's case* (c) it was merely ruled that the wife should answer over. These cases, therefore, only show that where the husband abjured the realm, the wife might be considered as a *feme sole*, when she sought to recover seisin of lands which she held in her own right. But if a man abjured the realm, he could never return without the leave of the King, and, if he did, he was treated as a felon, and punishable with death. But transportation bears no resemblance to abjuration for life. On the consummation of the marriage, the husband is possessed of all his wife's personal property, and whatever she acquires afterwards is his property, and obtained for him use. Besides, a convicted felon may be transported for an offence which is not capital, and for a period shorter than life, namely, for seven, or fourteen years; and when such period has expired, and he returns to this country, he is not only pardoned, but restored to all his former rights and capacities; and it is quite clear that the *vinculum matrimonii* is not broken or destroyed by the transportation of the husband for a term of years, but is only suspended during that period. By the statute 6 Geo. 4, c. 84, s. 86, it is enacted, "that it shall be lawful for every felon under sentence of transportation, who has received any remission from the Governor of New South Wales, or any other colony, while such felon shall reside in a place where he lawfully may reside under such sentence, to maintain any action or suit for the recovery of any property acquired by such felon since his conviction;" and the statute 19 Geo.

(a) Page 66.

(b) 2 Hen. 4, fol. 7.

(c) 10 Edw. 3, fol. 53.

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3, c. 74, s. 27, enacts, "that, where any male person shall be lawfully convicted of grand larceny, or any other crime, except petty larceny, it shall be lawful for the Court before whom any such person shall be so convicted, to order and adjudge that such person, appearing to be of competent age, and free from any bodily infirmity, shall be punished by being kept on board ships or vessels properly accommodated for the security, employment, and health of the persons to be confined therein, and by being employed in hard labour in the raising sand, soil, and gravel from, and cleaning the river *Thames*, &c., for any term not less than one year, nor more than seven years, in case the offender should be liable to be transported for four years." Here, the convict had a *spes redeundi*. This restriction, therefore, cannot be assimilated to abjuration for life. Besides, transportation is to the King's own dominions, and not to foreign parts, and there is no abjuring the realm. Civil death cannot apply to transportation for a term of years, but only to cases where there is a total and entire separation from the protection of the laws for ever. In *The Duchess de Duffie (a)*, it was decided, that, by attainting all the personal property and rights of action in respect of property relating to the party attainted, either before or after attainting, are vested in the Crown. In *Spence v. Ostrander* and *Windsor v. The Duchess de Richmond*, transportation, or voluntarily leaving the realm, and remaining abroad some years, was improperly considered as being homologous to abjuration; but the marriage contract cannot be affected by the mere temporary suspension of the rights of the husband, either in a religious or moral point of view. Here, it appears that the wife was in constant communication with her husband, and if she had borne children during the period of his confinement,

(a) 2 Barn. & Ald. 258.

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they would have been legitimate; and if she had committed adultery during his imprisonment, he might have sued the adulterer on his being discharged. The wife, therefore, could not acquire new rights or capacities by a temporary separation from her husband. She might or might not have been successful as a trader, and if she were made a bankrupt, and were uncertificated, the husband, on his discharge from the hulks, would be liable to her debts

[Mr. Justice *Bosanquet*.—If she went into service, could she not sue for and recover her wages?]

[Lord Chief Justice *Tindal*.—In *Ex parte Carrington* (a) it was held, that a *feme covert*, sole trader according to the custom of *London*, might be made a bankrupt with respect to her separate effects in trade.]

That is an excepted case; and if the wife brought an action for wages, the husband must have been joined for conformity, although she had served in *London*, and sued in one of the city Courts. *Beard v. Webb* (b). In *Deerly v. The Duchess of Massarine* (c), the husband was an alien enemy, and, on that ground, his wife was held to be chargeable as a *feme sole* as much as if he had abjured or been banished; and, in *Welford v. The Duchess de Picque*, the husband was a foreigner, and an alien. In *Kay v. The Duchess de Picque*, Lord *Ellenborough* said, (d) —“ If the husband has never been in this kingdom, the wife of an alien, I think, may be spelt as a *feme sole*. That is the Duchess of *Massarine's* case. I do not know whether it was distinctly brought to Lord *Kenyon's* attention that the *Duc de Picque* had been living with the defendant as his wife within the realm. If so, I cannot subscribe to his opinion.” His Lordship concluded by

(a) 1 Atk. 206.

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(b) 2 Bos. & Pul. 93.

(d) 3 Camp. 124.

(c) 1 Salk. 116; S. C. 2 Salk.

saying—"Where the husband has abjured the realm, or is exiled, he cannot return, and the case stands upon perfectly different principles."

[Lord Chief Justice *Tindal*.—The true distinction appears to me to be this—A transportation of the husband for a term of years merely operates as a suspension of his marital and civil rights during that period; but, in case of transportation for life, it amounts to a total extinguishment of such rights.]

Transportation, even for life, does not dissolve the religious tie of marriage, and there cannot be a suspension and revival of the husband's rights as long as he continues alive. The distinction in this case is, between transportation and abjuration. The consequences of the latter are enumerated in *Hawkins's Pleas of the Crown* (a), 3rd *Institute* (b), and *Stamford's Prerogative* (c). The punishment of transportation is of modern introduction, and was unknown to the common law. A married woman can only enter into a contract or carry on trade by the custom of *London*. Although, in *Ex parte Preston* (d), Lord *Apsley* held, that a *feme covert*, residing in *Middlesex*, separated from her husband by deed, and trading upon her own account, was liable to be made a bankrupt; yet that case was subsequently overruled by Lord *Thurlow* (e); and the true principle now is, that a *feme covert* trader cannot be subject to the bankrupt laws, unless she can be sued at law and charged in execution for her debts as a *feme sole*; and this liability must be confined to cases where the husband has abjured the realm, become an exile, or transported for life, when he is considered as civilly dead, and the wife as a widow, or else as divorced *a vinculo matrimonii*.

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(a) Book 2, c. 9, s. 44.

(b) Page 115, c. 51.

(c) Page 117.

(d) Green's Bkpt. Laws, 8.

(e) See Cooke's Bkpt. Laws, 40.

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Mr. Serjeant *Jones*, in reply.—It may be admitted as a general rule, that a *feme covert* cannot trade. But, where the husband has abjured the realm, or been transported for life, or even for a term of years, it forms an exception to the rule, and the disability of the wife is suspended during the period of the husband's remaining abroad, or being incarcerated in this country. There is no valid distinction between the capacity of a married woman to sue and be sued in cases relating to land, or in cases of contract. The rights of the husband may be suspended as well as extinguished; and if so, the difference between abjuration and transportation cannot avail. The result of all the authorities is, that, although the religious tie of matrimony is not dissolved, the civil rights of the husband are extinguished or suspended during the term for which he was sentenced to be transported. In *Spencer v. Carruthers*, the husband was transported for seven years. So, in *Carrol v. Blencow*, the sentence was for seven years. In *De Gaillon v. L'Aigle*, all the previous authorities were adverted to and confirmed by the Court; and Mr. Justice *Buller* said (a)—“As the husband was banished, whether for life or not, the matrimonial rights during his banishment were at least suspended.” That is precisely in point; and here, if the wife could not be liable to be sued, she could obtain no credit, and would be deprived of all means of supporting herself and her family. In *Lean v. Schutz* (b), the Court admitted that the wife might acquire a separate character by the civil death of her husband, as by exile, profession, or abjuration. The same principle applies to transportation. In *Hatchett v. Baddeley*, Lord Chief Justice *De Grey* said (c) that an exile, one abjuring the realm, or perhaps one professed, are looked upon as dead in law; and, in *La Vie v.*

(a) 1 Bos. & Pul. 359. (b) 2 Sir Wm. Bl. 1199. (c) Id. 1081.

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Philias (a), a *female covert*, being a sole trader in London, was held liable to a commission of bankruptcy, and it was decided that her assignees should come in, *paramount* the assignees of the husband, although his was the prior bankruptcy; on the principle that as the trade was carried on for the benefit of the wife, it was but just that she should bear the burthen. Although, in *Marsh v. Hutchinson*, Lord Chief Justice Eldon said (b) — "When the husband is banished he is considered as civilly dead; but transportation for a term of years may give rise to many difficulties with respect to the enjoyment of the husband's estate, both real and personal;" yet, if the wife were prohibited from trading, she could neither sue nor be sued, nor could she obtain credit, nor be able to provide for herself or her family; but where she may sue and be sued, she may also trade, and may consequently be liable to be made a bankrupt as a trader, within the meaning of the bankrupt laws.

Cur. adv. vult.

The following certificate was afterwards sent to his Honor the Vice Chancellor:—

We have heard this case argued by counsel, and considered the same, and are of opinion, that, at the date and suing forth of the commission of bankrupt against *Kezia Franks*, to wit, on the 25th day of July, 1827, the said *Kezia Franks* was a trader, and, as such, liable to become bankrupt within the true intent and meaning of the act of Parliament passed in the sixth year of the reign of his late Majesty King George the Fourth, intituled, "An act to amend the laws relating to bankrupts."

N. C. TINDAL,

J. A. PARK,

S. GASELEE,

J. B. BOSANQUET.

(a) 1 Sir Wm. BL 570.

(b) 2 Bos. & Pul. 232.

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RICHARD BADHAM, and SARAH, his Wife, late SARAH MEE, Widow, SARAH PATIENCE MEE, an Infant, and Others, v. RICHARD MEE, CAROLINE MEE, JOHN MEE, and Others.

By a marriage settlement, certain lands were conveyed to trustees to the use of the husband for life, with power of appointment to male issues, remainder to the trustees to preserve contingent remainders; remainder, in default of appointment, to the sons successively in tail general; remainder to the right heirs of the husband. After the marriage the husband became bankrupt, and his lands were conveyed by the commissioners to his assignees, by deeds of bargain and sale, who afterwards sold them, subject to the contingencies in the deed of settlement. The husband afterwards executed a deed of appointment to his son in fee, after the determination of his own life estate:—*Held*, that the son took no estate under the appointment, but that, under the marriage settlement, he took an estate tail in remainder, expectant on the determination of the life estate of his father.

THE following case was directed, by his Honor, the Master of the Rolls, to be submitted to the Judges of this Court for their opinion:—

Patience Mee, widow, deceased, and *Richard Mee* the elder, or one of them, being seised in fee simple of the lands and hereditaments hereinafter mentioned, by indentures of lease and release, bearing date respectively the 24th and 25th April, 1794, the release being made and duly executed by *Patience Mee*, of the first part, the said *Richard Mee* the elder, therein described as *Richard Mee*, of the second part, the Rev. *John Durant* of the third part, *Margaret Durant* of the fourth part, the Rev. *John Dudley* and *Abrather Hawkes* of the fifth part, and *Sparry Peshall* and *George Durant* of the sixth part—being the settlement made previous to the marriage of the said *Richard Mee* the elder with *Margaret Durant*, which was afterwards solemnized—the said *Patience Mee* and *Richard Mee* respectively granted, bargained, sold, and released certain messuages, lands, tenements, and hereditaments therein particularly described, unto the Rev. *John Dudley* and *Abrather Hawkes*, in their actual possession then being, to hold the same to them, their heirs and assigns, to the uses thereafter expressed, that is to say, to the use of the said *Patience Mee* and *Richard Mee*, their heirs and assigns respectively, according to their several estates and interests in the premises immediately before the execution of the said deed, until the in-

tended marriage between the said *Richard Mee* and *Margaret Durant* should be solemnized, and, after the solemnization thereof, to the use of the said *Sparry Peshall* and *George Durant*, their executors, administrators, and assigns, for the term of ninety-nine years, upon certain trusts; and, subject thereto, to the use of the said *Richard Mee* and his assigns, for life, without impeachment of waste; and, from and after the determination of that estate, by forfeiture or otherwise, to the use of the said *Rev. John Dudley* and *Abrather Hawkes*, and their heirs, during the natural life of the said *Richard Mee*, in trust to preserve the contingent remainders thereafter limited; but, nevertheless, to permit the said *Richard Mee* and his assigns, during his natural life, to take the rents, issues, and profits of the said premises to his and their own use; and, from and after the decease of the said *Richard Mee*, to the end, intent, and purpose, that the said *Margaret Durant* and her assigns, in case she should survive the said *Richard Mee*, should receive and take, during the term of her natural life, out of the rents, issues, and profits of the said hereditaments, one annuity or yearly rent-charge of 150*l.*, payable as therein mentioned, which said annuity was to be in lieu of all dower and thirds; and, subject to the said annuity, to the use of the said *Sparry Peshall* and *George Durant*, their executors, administrators, and assigns, for and during the term of six hundred years, to commence from the day of the death of the said *Richard Mee*, without impeachment of waste, upon certain trusts; and, subject thereto, to the use of such one or more of the son or sons of the said *Richard Mee* on the body of the said *Margaret Durant* lawfully to be begotten, and in such shares and proportions, and for such estate and estates, in fee simple or otherwise, and subject to such charges, provisions, conditions, and agreements in favour of other the child or children of the said intended marriage as the said *Richard*

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Mee, in and by any deed or writing, deeds or writings, with or without power of revocation, by him to be duly executed in the presence of two or more credible witnesses, or by his last will and testament in writing, by him to be duly executed in the presence of and attested by three or more credible witnesses, should grant, convey, give, devise, limit, direct, or appoint the said premises, or any part thereof. And for and in default of any such grant, conveyance, gift, devise, limitation, or appointment, and subject thereto, and as to any part or parts of the said premises as should not be disposed of, or when and as the estates thereby limited should respectively fall in, cease, and determine, and subject thereto, to the use of the first son of the body of the said *Richard Mee* on the body of the said *Margaret Durant* lawfully to be begotten, in tail general; remainder to the use of the second, third, fourth, fifth, sixth, and all and every other the son and sons of the body of the said *Richard Mee*, on the body of the said *Margaret Durant* lawfully to be begotten, in tail general; remainder to the use of the right heirs of the said *Richard Mee*, for ever. Then followed a power for *Richard Mee* to raise the sum of 5,000*l.*, by way of mortgage for a term of six hundred years, subject to certain conditions and restrictions; and the trust of the term was declared to be for raising portions for younger children, and paying them in the mode therein prescribed.

The intended marriage between *Richard Mee* and *Margaret Durant* was duly solemnized. *Margaret Mee*, formerly *Durant*, died, leaving issue of the marriage four children only, namely, *Richard Mee* the younger, *Caroline Mee*, *Sarah Mee*, and *John Mee*, of whom *Richard Mee* the younger, and *Caroline Mee* respectively attained the ages of twenty-one years before *June*, 1829. On the 12th *June*, 1798, a commission of bankrupt was awarded and issued against *Richard Mee* the elder, under which he was duly found and declared a bankrupt; and *John Hodgetts* and

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Thomas Brettell were chosen and appointed assignees of his estate and effects, and by indentures of bargain and sale duly enrolled, and bearing date the 14th July, 1798, the major part of the commissioners in the said commission named did, so far as they lawfully might, bargain and sell unto and to the use of the said *John Hodgkiss* and *Thomas Brettell*, their heirs and assigns (*inter alia*) the aforesaid lands and hereditaments.

The assignees advertised the lands for sale subject to the payment of the annuity of 150*l.* to *Margaret Mee*, the wife of the bankrupt; and they afterwards contracted with *Mrs. Patience Mee* to sell to her the whole of their estate and interest in the said premises; and accordingly, by indentures of lease and release, bearing date respectively the 9th and 10th May, 1799, the release purporting to be made between *John Hodgkiss* and *Thomas Brettell* of the first part, *Richard Mee* of the second part, and *Patience Mee* of the third part, it was witnessed, that, in pursuance of the said agreement, and in consideration of the sum of 400*l.* to the said *John Hodgkiss* and *Thomas Brettell*, or one of them, well and truly paid by the said *Patience Mee*, they, *Hodgkiss* and *Brettell*, did, according to their respective estates and interests in the premises, bargain, sell, alien, release, and convey unto the said *Patience Mee*, and to her heirs and assigns, all the aforesaid lands and hereditaments, to hold the same unto the said *Patience Mee*, her heirs and assigns, to and for the only proper use and behoof of the said *Patience Mee*, her heirs and assigns, for ever; chargeable nevertheless and subject to the contingencies mentioned in the said indenture of settlement.

Mrs. Mee died in 1806, having made her will, bearing date the 15th December, 1801, and duly executed to pass freehold lands by devise; and by that will she disposed of the interest which she took in the said hereditaments under the aforesaid conveyance, in favour of certain persons who

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were defendants, or had transmitted their interests to the defendants in this suit.

By a deed poll, dated the 2nd *January*, 1819, under the hand and seal of the said *Richard Mee* the elder, and attested in the manner required for the due exercise of the power reserved to him by the aforesaid marriage settlement—after referring to his said power, and reciting (among other things) that there were then living issue of the said *Richard Mee* by the said *Margaret Mee* deceased, four children only, namely, *Caroline Mee*, *Richard Mee*, *Sarah Mee*, and *John Mee*; and that the said *Caroline Mee* and *Richard Mee* had attained their respective ages of twenty-one years—the said *Richard Mee* the elder did, in pursuance thereof, *direct, limit, and appoint*, that, from and after the decease of him the said *Richard Mee* the elder, and the determination of his life estate, and the determination of the said term of six hundred years, and in the meantime subject and without prejudice to the estate for life of the said *Richard Mee*, party thereto, and to the said term of six hundred years, and the trusts of the same term as far as they were capable of taking effect, the said lands and hereditaments should remain to the use of the said *Richard Mee* the younger, his heirs and assigns, for ever; nevertheless charged and chargeable with such sum and sums of money as should become payable under the appointment thereafter made; the same to be in satisfaction and discharge of the portions, if any, to which the said *Caroline Mee*, *Sarah Mee*, and *John Mee* the younger, were or might be, or might claim to be entitled to receive under or by virtue of the before-mentioned indenture of the 25th *April*, 1794. And the said *Richard Mee* the elder, in exercise and execution of the said power, did also *direct, limit, and appoint* the sum of 5,000*l.* to be raised for and paid to the said *Caroline Mee*, *Sarah Mee*, and *John Mee* the younger, their executors, administrators,

and assigns, on the decease of him the said *Richard Mee* the elder, in the manner therein mentioned. Some time afterwards, *Richard Mee* the younger died, leaving the plaintiff, *Sarah Patience Mee*, his only child, him surviving.

There being various equitable claims affecting the said lands and hereditaments, a suit in *Chancery* was instituted, in order (among other purposes) to ascertain the respective rights and interests of the different parties in the premises; and the question directed by the Master of the Rolls for the opinion of this Court, was—

What estate, from and after the execution of the said deed of appointment of the 2nd *January*, 1819, *Richard Mee* the younger took in the said lands and hereditaments, under the said deed of appointment, and the said deeds of the 24th and 25th *April*, 1794, or any or either of them.

The case came on for argument in the course of the last term.

Mr. Serjeant *Spankie*, for the plaintiffs.—By the execution of the power by *Richard Mee* the elder, a base fee was created, and an estate in fee simple passed to his son *Richard*, the appointee, or, at all events, a base fee. The power was well executed by *Richard Mee* the elder; and, as it was for the benefit of children, purchasers under a marriage settlement, it was not extinguished by the bankruptcy. As *Richard Mee* the elder merely took an estate for life, and the power did not operate upon or derogate from such estate, it was a power in gross, and consequently could not be extinguished by the destruction of *Mee's* life estate. The bargain and sale by the commissioners to the assignees was an innocent conveyance, and only passed what the grantor himself had a right to convey; and a conveyance of *Mee's* life estate did not affect the power of appointment; for, although a tenant for life, or for years, convey all his estate and inter-

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est, yet, as it is an innocent conveyance, it cannot affect a power in gross to be exercised for the benefit of the children of the marriage. Although it may be said, that *Mee* the elder had the ultimate contingent remainder in fee, which was conveyed by the deeds of bargain and sale to the assignees, yet the power of appointment did not pass on the transfer of *Mee's* life estate, because the power to be exercised was for the benefit of children as purchasers under the marriage settlement; and *Mee's* assignees only took what the commissioners had a right to convey, but nothing in derogation of his power to act for the benefit, and to appoint in favour of his children as purchasers, which power remained untouched and unimpaired. In *Thorpe v. Goodall* (a), where a bankrupt, seised of an estate for life, had a general power of appointment, and it was prayed that he might execute it in favour of his creditors, Lord *Eldon* held that he had no authority to compel the execution of the power. Here, however, there was no power which the bankrupt could execute for the benefit of his creditors or assignees, as the power of appointment was limited to the children of the marriage; and none but them could derive any benefit from, or obtain any estate by virtue of the appointment. The contingent interest of *Mee* the elder was alone transferred to the assignees. In *Doe d. Coleman v. Britain* (b), where a trader being seised of an estate for life, with a general power of appointment, with remainder, in default of appointment, to himself in fee, after having committed an act of bankruptcy, upon which he was afterwards declared a bankrupt, executed his appointment in favour of an appointee—it was held, that, all the bankrupt's interest having passed to his assignees by the assignment, the appointment was void; but there, the legal effect of the conveyance was, to give the bankrupt an estate for life, in case he made no appointment, and then to trustees for

(a) 17 Ves. 388, 460; S. C. 1 Rose's Bkptcy. Cas. 40.

(b) 2 Barn. & Ald. 93.

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his life, with remainder to himself in fee. He therefore had an estate for life, defeasible in the event of his making any appointment; and as he himself took an interest under the appointment, it was properly held, that, as his bankruptcy intervened, his power of appointment was gone. There, too, the lessor of the plaintiff was his assignee; but here, *Mee's* ultimate remainder was not to take effect except upon failure of issue, and his life estate only passed to the assignees for the benefit of the creditors; so that the appointment to *Richard Mee* the son must be taken to enure as a base fee, and does not affect the ultimate remainder. In *Sugden on Powers* (a), it is said, that, although tenant for life assume to pass a fee, yet, if he convey by an innocent conveyance, as a bargain and sale, the power will not be destroyed, and for this obvious reason, that the conveyance passes only what the tenant for life lawfully may pass, viz. his estate for life. Again, it is said (b)—As to powers in gross, they are independent of the estate of the donee, and would not, therefore, be suspended by the grant of a lease. In *Edwards v. Slater* (c), where a tenant for life committed a forfeiture by accepting a scoffment, and then exercised a power in gross, and afterwards a remainder-man entered and reduced the estates, it was held that the power was well-executed, as the donee had a *right* to make it; and Lord Chief Baron *Hale* there said (d)—“It is hard to say that the bargain and sale have destroyed the power, because the power is collateral, and the estate to be limited does not arise out of the tenancy for life, but out of the first estate.” Again (e): “Where the power does not fall within the estate, as, where the tenant for life has a power to make an estate which is not to begin till after his own estate determined, such power is not appendant or annexed to the land, but is a power in

(a) 3rd Edit. 61.

(d) *Ib.* 413.(b) *Ib.* 53.(e) *Ib.* 416.(c) *Hardres*, 410.

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gross, because the estate for life has no concern in it. An assignment of *totum statum suum*, or other alteration of the estate for life, does not affect such a power, because it is a power in gross." In *Bullock v. Thorne* (a), where a person who had a power to revoke a use, made a lease for years, and levied a fine for assurance of the lease, without use expressed, the power of revocation was held not to be extinguished by the fine, but only suspended during the term; and the Court drew the distinction, and held, that, if one has a power of revocation entire, and he extinguishes or suspends the power in part, he may still revoke for the residue, if it be by way of use, but not so of a condition annexed to the land: and here, the power was to operate as a use, and not by way of condition. The general principle is, that every power in gross may be exercised, although the donee may have previously parted, by an innocent conveyance, with the estate to which it was annexed in privity. In *Cruise's Digest* (b) it is said—"With respect to those powers relating to land which are called powers in gross, as the estates to be created by them do not fall within the compass of the person's estate to whom they are given, a mere alteration of that estate will not affect them. Hence, if a tenant for life, with power to settle a jointure, or to create a term for years to commence from his decease, conveys away his life estate by bargain and sale, such a conveyance will not destroy his power: and if he should even make a conveyance in fee by such an assurance, as it passes no greater estate than the grantor has a right to convey, the power would not be affected by it." It is doubtful whether a power of appointment under which children have an interest, can be destroyed even by forfeiture; for, in *Jesson v. Wright*, in error (c), Lord *Redesdale* asked—"How can a man, having a power for the

(a) Moore, 616.

(b) 3rd Edit., Vol. 4, p. 248.

(c) 2 Bligh, 15, first series.

benefit of children, destroy it?" and here, the power was to be exercised in favour of the issue of the marriage as purchasers.

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Mr. Serjeant *Taddy*, *contra*.—*First*, the power was extinguished by the bankruptcy, and consequently the appointment by *Mee*, the father, to his son was wholly void—*Secondly*, even if *Mee* the elder had at the time a power to appoint, such power has not been well executed.

First—By the statutes 13 *Elizabeth*, c. 7, s. 2, and the 21 *James* 1, c. 19, s. 12, every interest, power, or possibility which the bankrupt could have departed withal, or could have destroyed by suffering a common recovery, levying a fine, or otherwise, is transferred, and passes to the commissioners under the bankruptcy. The question then is, whether *Mee* the elder, if the bankruptcy had not intervened, could, by common recovery, have cut off or debarred those who now claim to take under him by virtue of the power of appointment. There can be no doubt but that he might have so done. In *Smith v. Death* (a), it was held that a power of appointment in a grantee for life, although in favour of particular objects, was extinguished by a recovery; and the case of *West v. Berney*, which came before the Vice Chancellor in the year 1819, being referred to in the course of the argument, his Honor said—"That, in that case, it appeared to him, as the result of the authorities, that every power reserved to a grantee or devisee for life, though not appendant to his own estate, as a leasing power, but to take effect after the determination of his own estate, and therefore in gross, might be extinguished. That such a grantee or devisee could deal with the estate in support of his freehold interest; and his dealing with the estate, so as to create interests inconsistent with the exercise of his power, must extinguish his

(a) 5 Madd. 371.

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power, upon the general principle that a person is not permitted to defeat his own grant. That it made no difference that the power was a particular power in favour of children. That *King v. Melling* (a) was a particular power in favour of the wife; that such a power could not be called a trust, for the alleged *cestui que trust* could not compel the execution of it, and, being at the option of the grantee for life to exercise or not, any dealing with the estate inconsistent with its exercise must determine his option." So, here, *Mee* had an option to exercise the power or not as he thought fit, for he was not like a trustee, and, as such, compellable to exercise his trust. He might either have appointed or not; but, with regard to him, the power cannot be deemed a power for the benefit of other persons, because it was to be executed for the benefit of his own children only, and not in favour of strangers. In *King v. Melling* it was expressly decided that a power to make a jointure was destroyed by a recovery; and there is no real distinction to be drawn between a power of jointuring and a power of appointing to children, for in neither case is the donee compellable to exercise his power. There, as in this case, the estate was to commence after the determination of the donee's estate for life; and Mr. Baron *Rainsford* said (b)—"The power to make a jointure is destroyed by the alteration of the estate to which it is annexed in privity, so that the common recovery being a forfeiture of the estate for life, by consequence it is an extinguishment of the power;" and Mr. Justice *Twisden* said (c)—"It is plain that the power is extinguished, for by the recovery, the estate for life to which it was annexed in privity is gone and forfeited." The principle that a bargain and sale is to be considered and taken as an innocent conveyance, and displacing no estate, does not apply to a bargain and sale under a bankruptcy, because, by the

(a) 1 Ventris, 225.

(b) Id. 226.

(c) Id. 227.

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statute 21 Jac. 1, c. 19, s. 12, conveyances by the commissioners are made good against all persons claiming any estate or interest under the bankrupt, and against all persons whom he, by common recovery or otherwise, might cut off and debar from any remainder, reversion, profit, title, or possibility. In *Sugden on Powers*, it is said (a)—“If an estate be limited to the children of the marriage, as the parent shall appoint by will, or to the children *living at the parent's decease*, as he shall appoint by deed or will, with a remainder, in either of these cases, to the children in fee; in both these cases no effectual settlement can be made upon or by a child until the parent's death.” In *West v. Berney* and *Smith v. Death* the Vice Chancellor was of opinion that the power was destroyed by the recovery. The same point was determined by the Master of the Rolls in the case of *Horner v. Swan*, on the 8th December, 1823, on the grounds that the donee of a power is not a trustee, but has his option whether he will execute it or not; that the power was annexed in privity to the estate; and that the donee had a beneficial interest, namely, to make a provision for his children. In *Edwards v. Slater*, Mr. Baron Turner said (b)—“I hold that the power is not well executed, because it is destroyed by the bargain and sale; and it might be mischievous, if the power were held to be collateral, for then, if the tenant for life should grant a rent-charge, and afterwards make a lease, &c., he would avoid his own act. But, because it savours of the land, it is gone by the bargain and sale, and passes together with the land, and amounts to a confirmation by reason of the estate in fee expectant.” In *Coke Littleton* it is said (c)—“If he that hath power of revocation, hath no present interest in the land, nor by the ceasor of the state shall have nothing, then his feoffment or fine, &c., of the land is no extinguishment of his power, because it is mere

(a) 3rd Edit. 78.

(b) Hardres, 415.

(c) Co. Litt. 237. a.

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collateral to the land." But the power of appointment in this case is intermediate and annexed in privity to the estate, and capable of being destroyed by the act of the party, and consequently it was destroyed by the bargain and sale under the bankruptcy, which is in effect the same as if *Mee* the elder had suffered a recovery. In *Thorpe v. Goodall*, Lord *Eldon* said (a)—"If the estate of the bankrupt has passed under the assignment, so that the power is destroyed, then there is no occasion for this bill. All that falls within those general words, 'possibility of profit,' passes under the bargain and sale;" and, in pronouncing judgment, his Lordship said (b)—"The question is, whether there is any equity in this Court to compel the bankrupt to execute this power:" and he concluded by saying that he was of opinion that he could not be compelled to do so.

Secondly—The power was not well executed by *Mee* the elder after the bankruptcy had intervened, as, by the statutes of *Elizabeth* and *James* the First, not only his estate for life, but the ultimate remainder in fee, passed to his assignees. The question therefore is, whether he could defeat or displace that remainder, or create a fee, in derogation of his own previous grant. Although it is said that the appointment may enure as a base fee, as the ultimate remainder to *Mee* the elder was not to take effect till the failure of issue, yet no remainder can be limited upon a base fee. One fee cannot be mounted upon another. *Littleton* says (c)—"A man cannot have a more large or greater estate of inheritance than fee simple;" and Lord *Coke*, in commenting on that section, says (d)—"For this cause, two fee simples absolute cannot be of one and the self same land. One fee simple cannot depend upon another by the grant of the party; as, if lands be given to *A.*, so long as *B.* hath heirs of his body, the remainder

(a) 17 Ves. 393.

(b) *Id.* 461.(c) *Litt.* s. 11.(d) *Co. Litt.* 18. s.

over in fee, the remainder is void." In *Seymour's* case (a), it is said—"An estate of fee simple is either an estate of inheritance absolute and indeterminable; as, where lands are given to a man and his heirs, he has such a pure and absolute estate which can never determine; or a fee simple determinable, and that is in two manners, *viz.* either expressly derived out of an absolute and pure estate in fee simple, or *implicite*, and derived out of an estate tail; out of an absolute estate in fee also in two manners—*first*, by condition, as upon mortgage, and that is called a fee simple conditional—*secondly*, by limitation, as, if *A.* enfeoffs *B.* of the manor of *D.*, to have and to hold to him and his heirs, so long as *C.* has heirs of his body, and that is called a fee simple limited and qualified; and in both these cases the whole estate in the land is in the feeoffee; and therefore no remainder or reversion can be expectant upon either of them." In *Gardner v. Sheldon*, it is said (b)—"A remainder cannot depend upon an absolute fee simple, by necessary reason; for, when all a man hath of estate, or any thing else, is given or gone away, nothing remains but an absolute fee simple being given or gone out of a man, that being all, no other or further estate can remain to be given or disposed, and therefore no remainder can be of a pure fee simple;" consequently, there cannot be a remainder expectant on a fee simple, whether absolute or qualified; and here, the effect of the appointment, if valid, would be to displace the remainder *in toto*: but the appointment must be considered as if the estate were limited by the marriage settlement, and then a fee could not have been mounted on a fee.

Mr. Serjeant *Spankie*, in reply, was desired by the Court to confine himself to the point, whether the power had been well executed, after the bargain and sale to the assignees.

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(a) 10 Rep. 97 b.

(b) Vaughan, 269.

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It may be admitted that a remainder cannot be limited upon a base fee, or a fee mounted on a fee, except in certain modes prescribed by law; but here, the conveyance to the assignees of the bankrupt's ultimate remainder, was a conveyance of a mere contingency, without any act of the bankrupt himself; and the assignees had the ultimate remainder, subject to the same power as existed in the bankrupt, and took nothing in derogation of his power to appoint for the benefit of his children, purchasers under the deed of settlement. The Court will not look at the incidental advantages to be derived by the donee. He was bound to appoint for the benefit of his family; and although he has made the appointment in favour of one son only, it must in effect tend to benefit the whole of his issue, and consequently the power was well executed; and, as it was for the benefit of children, it was not destroyed by the bargain and sale to the assignees: the base fee created by the appointment was analagous and equivalent to an estate tail in the appointee.

Cur. adv. vult.

The following certificate was afterwards sent to the Master of the Rolls:—

We have heard this case argued by counsel, and have considered the same, and we are of opinion, that, from and after the execution of the deed of appointment of the 2nd of *January*, 1819, *Richard Mee* the son did not take any estate in the lands and hereditaments mentioned in the case under the said deed of appointment; but that, under the deeds of the 24th and 25th of *April*, 1794, he took an estate tail in remainder expectant on the determination of the life estate of his father.

N. C. TINDAL,
J. A. PARK,
S. GASELEE,
J. B. BOSANQUET.

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DEVERNER v. BOUVERIE.

Wednesday,
Nov. 2nd.

A RULE was obtained by Mr. Serjeant *Wilde*, in the last term, calling on the defendant to shew cause why he should not produce and allow the plaintiff to inspect and take a copy of an indenture made between the plaintiff and defendant, in order to enable the plaintiff to declare thereon. The motion was founded on affidavits which stated, that the action was brought to recover the arrears of an annuity due from the defendant to the plaintiff; that the deed in question was dated and executed on the 11th October, 1814, and by which the defendant, in consideration of 650*l.* advanced to him by the plaintiff, had granted to the plaintiff an annuity of 100*l.* *per annum*; that there was no counterpart of the deed, which, on its execution, was deposited with one *Riley*, who was the attorney or solicitor employed by the defendant, and that it was left in his hands, as the agent for and on behalf of all parties, upon an understanding that he, *Riley*, should receive the annuity from the defendant for the plaintiff; that *Riley* continued to pay the annuity until the year 1830, when he absconded, after which the present action was commenced for the arrears then due; and the plaintiff deposed that he believed the deed to be now in the custody of the defendant; and that he had refused to allow the plaintiff to inspect it or take a copy.

An annuity deed was prepared by one *R.*, as agent of both the grantor and the grantee, and, there being no counterpart, was left in the hands of *R.*, who received, and for several years paid over to the grantee the amount of the annuity. *R.* ultimately absconded, and the deed came into the possession of the grantor on his redeeming the annuity two years after it was granted. In an action by the grantee against the grantor for arrears of the annuity, the Court permitted the former to inspect and take a copy of the deed, to enable him to declare thereon, although it was sworn by the latter that *R.* was the agent of the grantee alone.

Mr. Serjeant *Mercwether* now shewed cause, on an affidavit of the defendant, which stated, that the deed was prepared by *Riley*, and placed in his hands, as the agent of the plaintiff alone, and not as the attorney or solicitor of the defendant; and that, in the year 1816, the defendant redeemed the annuity by *bonâ fide* paying the amount of

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the consideration money to *Riley*, who thereupon delivered up the deed to the defendant to be cancelled.

The learned Serjeant submitted, that, under these circumstances, the Court would not interfere summarily, and compel the defendant to produce the deed, as he became lawfully possessed of it upon redeeming the annuity, and paying the whole of the consideration money to *Riley*, the plaintiff's agent, who was authorized to receive it, and who not only held the deed, but also received the annuity on account of the plaintiff until he, *Riley*, absconded; that it was the duty of the plaintiff to have watched the conduct of his agent; and that, as both parties were innocent of fraud, the well-known maxim applied, that "*potior est conditio possidentis.*"

Mr. Serjeant *Wilde*, in support of his rule.—The defendant has not denied that the deed was left with *Riley*, as the agent for and on behalf of all parties. *Riley* had no authority from the plaintiff to deliver up the deed to the defendant on his redeeming the annuity; and he not only kept this a secret from the plaintiff, but continued to pay the annuity up to the time he absconded, which was sixteen years after the deed was deposited with him. Although the plaintiff might have authorized *Riley* to receive the annuity from the defendant, it does not follow that he was the plaintiff's agent for the purpose of the defendant's redeeming it; and the latter was guilty of *laches* in having done so without communicating with the plaintiff, or requiring his discharge in writing. There can be no doubt but that *Riley* acted as the attorney for all parties on the granting of the annuity, and it must be assumed that he held the deed as trustee for the grantor and grantee. If it had remained in his possession, the plaintiff would have been entitled to inspect it, and take a copy; and the defendant having obtained the deed without the

plaintiff's authority, he may now inspect it for the purpose of declaring upon it, he having been guilty of no omission in leaving it in the hands of his attorney, who was to receive the annuity for him.

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Lord Chief Justice TINDAL.—We are not called upon by this application to decide the point in issue between the parties: we are only desired to put it in a due course for further inquiry; and the only and ultimate question is, whether the annuity granted by the defendant was redeemed by him in the year 1816, by payment of the consideration money to *Riley*. The plaintiff ought to have an opportunity of investigating that fact before a Jury, and slight evidence will be sufficient for him to launch his case. If he were nonsuited for a variance between the deed declared on and that produced in evidence, he would be entitled to have the instrument read, and to a new trial: but the variance would probably be of such a nature as to induce the Judge to amend the record at once, pursuant to the authority given to him by the late statute, 9 *Geo.* 4, c. 15. But we need not speculate on that, for this case appears to me to fall within the ordinary rule which entitles a party to the inspection of a deed or written instrument placed in the hands of another as trustee for the executing or contracting parties. It is admitted, that there was only one copy of the deed, and that it was placed in the hands of *Riley* as an agent; and the defendant has not positively denied that *Riley* was the agent for all parties, but merely that he was the attorney or solicitor of him, the defendant. The probabilities are, that *Riley* acted as the agent of both the plaintiff and defendant at the time the annuity was granted, as the defendant no doubt applied to him to procure the money, and he obtained it from the plaintiff. As the deed contained a proviso for the redemption of the annuity by the defendant, it was for

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his benefit that the deed should remain in the custody of the attorney who prepared it. This, therefore, appears to me to fall within the ordinary case of a trustee who holds a deed for all the contracting parties. But, even supposing that *Riley* was agent for the plaintiff alone, who is in fault? If either party, it is the defendant. No want of caution is attributable to the plaintiff; for it appears that *Riley* continued to pay the annuity to him till the year 1820. He therefore had a right to suppose that the deed remained in his custody up to that time; and the defendant merely states that he paid *Riley* the full amount of the consideration money when he redeemed the annuity, without shewing that *Riley* had power from the plaintiff to receive the money, or to surrender the deed to the defendant. On the whole, therefore, it appears to me that the want of caution is in the defendant rather than in the plaintiff; and that the latter has a right to inspect and take a copy of the deed.

Mr. Justice GASLÉE.—The parties came before me at Chambers, and I refused to interfere, but desired that the application might be made to the Court; and, for the reasons now stated by my Lord Chief Justice, I think the plaintiff is entitled to an inspection of the deed. It is clear that *Riley* was the defendant's agent at the time the annuity was granted, for the deed was prepared by and deposited with him; and he delivered it over to the defendant, without the knowledge or authority of the plaintiff.

Mr. Justice BOSANQUET.—According to the established practice, the plaintiff is entitled to inspect and take a copy of the deed. The parties to it were the grantor and grantee of the annuity; both, therefore, were interested, and it appears that no counterpart was executed, but the deed itself was left in the hands of a third person,

who was, at all events, the agent of the plaintiff, as the grantee; and he now swears that he believes that it is in the possession of the defendant, who admits that fact, but states that it was delivered to him by *Riley* on his redeeming the annuity. The question then is, whether the defendant obtained the deed without the authority or knowledge of the plaintiff. That is for the consideration of the Jury; and the Court ought not to throw any obstacle in the plaintiff's way, so as to prevent him from trying the question; and, as both he and the defendant had an interest in the deed, we must assume that *Riley* held it as a trustee for both, and consequently the plaintiff has a right to inspect it for the alleged purpose of declaring upon it.

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Mr. Justice ALDERSON.—I am of the same opinion. It is only necessary for us now to decide that the plaintiff ought not to be debarred of an opportunity of trying the question fairly, which is, whether *Riley* parted with the deed to the defendant by the authority of the plaintiff, or whether *Riley* did not act as the agent of both parties in negotiating the annuity. The rule, therefore, must be made—

Absolute.

KING, Plaintiff; GIBSON, FARMER, and Others, Defendants.

Thursday,
 Nov. 3rd.

MR. Serjeant *Wilde* moved that this fine might pass, notwithstanding the affidavit of acknowledgment, which had been taken in *Jamaica*, was on paper, it being certified by one of the commissioners, in the margin of the affidavit, that no parchment could be procured there.—Although, in the

The affidavit of the acknowledgment of a fine was taken in *Jamaica* on paper, and in the margin of the affidavit of the caption it was certified that no

parchment could be procured there—the Court permitted the fine to pass, on the officer's engrossing a copy of the affidavit on parchment, and annexing it to the paper writing.

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KING,
Plaintiff;
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Deforciant.

case of *Palmer*, plaintiff, *Morgan* and wife, deforciant (a), it was held that the affidavit of taking the acknowledgment of a fine at *Archangel* must be engrossed on parchment; and that, even if the paper on which the affidavit was written was pasted on parchment, it would not be sufficient; yet, in *Seton*, demandant, *Sinclair* and wife, deforciant (b), a fine taken in *Scotland* was allowed to pass, although it was not taken in the presence of an attorney of one of the Courts of *Westminster*, on an affidavit being made by the demandant that there was no such attorney resident in or near *Edinburgh*; and, in *Price*, demandant, *Williams*, tenant, Lord *Somers*, vouchee (c), the notarial seal was dispensed with, on an affidavit stating that it was not the practice for notaries in *Portugal* to have such a seal.

Lord Chief Justice TINDAL.—It is merely for the sake of preservation, that the Court requires all the documents relating to fines and recoveries to be engrossed or written on parchment. Therefore, let the Secondary make a copy of the affidavit of the acknowledgment on parchment, and annex it to the paper writing; and if we are satisfied (and here there can be no doubt) that this is an authentic document, the parties will be quite secure by having a copy engrossed on parchment, and annexed to the paper, with this order of the Court.

Fiat (d).

(a) 4 J. B. Moore, 162; S. C. 1 Brod. & Bing. 472.

(b) 2 Sir W. Blac. 880.

(c) 4 Taunt. 573.

(d) But see *Randall*, plaintiff; *Lowering*, deforciant (6 B. Moore, 232), where the Court held that the certificate of a notary, as well as the affidavit of taking the acknowledgment of a fine in a foreign country, must be written on parchment; and that a literal translation of it, engrossed on

parchment, and referring to the original, would not supply the defect.

The Court, however, have since acted upon the case in the text. In *Trinity Term (post)*, they allowed a fine, the acknowledgment of which had been taken on paper in the *Brasils*, to pass, on the production of an affidavit by some person acquainted with the country, deposing that parchment cannot be procured there.

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WILLATTS v. JAMES KENNEDY.

Thursday,
Nov. 3rd.

THIS was an action of *assumpsit* on a guarantie.

At the trial, before Mr. Justice *Alderson*, at *Westminster*, at the last Sittings in the last term, the plaintiff obtained a verdict on the second count of the declaration—damages 25*l.* The count was as follows:—That one *Charles Kennedy*, before and at the time of the making of the promise and undertaking of the defendant thereafter next mentioned, was indebted to certain persons, commonly called and known by the name and using the style and firm of *Boome & Smout*, in a certain sum of money, to wit, the sum of 25*l.* 2*s.* of lawful money, &c., to wit, at *Westminster*; that the plaintiff, before and at the time of the making of the said promise and undertaking by the defendant, and while the said *Charles Kennedy* was so indebted as aforesaid, had been appointed by the High Court of *Chancery* receiver of the debts and moneys then due and owing to the said firm; by means whereof the said *Charles Kennedy* then and there became liable to pay to him the plaintiff, as such receiver, the said sum of money so by him, the said *Charles Kennedy*, due to the said firm as aforesaid, when he, the said *Charles Kennedy*, should be thereunto requested: and thereupon, and whilst the plaintiff was such receiver as aforesaid, and the said *Charles Kennedy* was so liable as aforesaid, to wit, on the 25th day of *November*, 1829, at *Westminster* aforesaid, in consideration of the last-mentioned premises, and that the plaintiff, as such receiver as aforesaid, at the special instance and request of the defendant, would not adopt any legal proceedings against the said *Charles Kennedy* for the recovery of the said sum

The plaintiff declared, that one *C. K.* was indebted to the firm of *B. & S.*; that the plaintiff had been appointed by the Court of *Chancery* receiver of the debts and moneys due to the firm, by means whereof *C. K.* became liable to pay to the plaintiff, as such receiver, the debt so by him due to the firm, when thereunto requested; and that, in consideration that the plaintiff, as such receiver, at the request of the defendant, would forbear to sue *C. K.* for the debt for the space of two months, the defendant undertook to pay the amount to the plaintiff at the expiration of that period, should it be then unpaid:—*Held*, on motion in arrest of judgment, that the declaration disclosed a sufficient authority in the plaintiff to sue as receiver; and also con-

tained a sufficient allegation of *C. K.*'s liability; and that there was a good consideration for the defendant's promise, as the plaintiff might have sustained a detriment by forbearing to sue *C. K.* without the authority of the firm.

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in which the said *Charles Kennedy* was so indebted to the said firm as aforesaid, for a period of two months thence next following, to wit, until the 25th day of *January* which should be in the year 1830, the defendant undertook and faithfully promised the plaintiff, as such receiver as aforesaid, to pay him the said sum of 25*l.* 2*s.* at the expiration of the said period of two months, to wit, on &c., at &c., should the said debt so due from the said *Charles Kennedy* to the said firm as aforesaid be then unpaid. The plaintiff then averred, that he, confiding in the said promise and undertaking of the defendant, did not adopt any legal proceedings against the said *Charles Kennedy* for the recovery of the said sum in which the said *Charles Kennedy* was so indebted to the said firm as aforesaid, for the said period of two months, to wit, until &c., but that the said *Charles Kennedy*, although he was afterwards, to wit, on &c., at &c., requested so to do, did not nor would pay the said sum of money, or any part thereof, to the plaintiff, as such receiver, or to the said firm, or to any other person on their behalf, but altogether refused and neglected so to do; and the same debt so due from the said *Charles Kennedy* to the said firm, was, at the expiration of the said last-mentioned period, to wit, on the said 25th *January*, 1830, aforesaid, wholly unpaid, to wit, at *Westminster* aforesaid; whereof the defendant afterwards, to wit, on &c., there had notice, and thereby and according to the tenor and effect of his said promise and undertaking, he, the defendant, then and there became liable to pay to the plaintiff, as such receiver as aforesaid, the said sum of 25*l.* 2*s.* on the day and year last aforesaid, to wit, at *Westminster* aforesaid.

Mr. Serjeant *Cross*, in the last term, obtained a rule *hisi* to arrest the judgment, on the grounds—*first*, that the plaintiff, as receiver, had no authority to forbear or give time for payment to any of the debtors of the firm of

Boeme & Smout, as he was merely authorized to collect and receive the debts and moneys due to the firm; and that, even if he had an authority to sue, his forbearing to do so was a breach of his duty—and *secondly*, that there was no consideration for the defendant's promise, as the debt he guaranteed the payment of was not due to the plaintiff, but to a third party, and the verdict in this suit would be no answer to an action brought by *Boeme & Smout* against *Charles Kennedy*, the original debtor.

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Mr. Serjeant *Wilde* now shewed cause.—The plaintiff was not appointed by the Court of *Chancery* as a receiver in the progress of a suit, but to recover and receive debts due to the partnership firm of *Boeme & Smout*. It was his duty to collect, and he had authority to sue for such debts; and, as incidental to that authority, he might exercise a reasonable discretion as to whether he should press the debtors to the firm for immediate payment, or give them time, which, in many instances, might be the more judicious course. Although no debt was due or owing from the defendant to the firm, he entered into a collateral contract with the plaintiff, as the receiver, to be answerable for one of the debtors in case he did not pay the sum in which he was indebted within a limited period. The defendant should have shewn all his grounds of defence at the trial; and, after a verdict, every intendment must be made in its favour. The contract was made with the plaintiff, and he alone was the proper person to receive the debts due to the firm. The original creditors could not sue after he had been appointed; and the defendant must have known that he made his claim on *Charles Kennedy* in his character of receiver. The plaintiff acted on his own responsibility, and it was his duty to receive moneys and hold them as a trustee for the original creditors. He was not their agent, but clothed with an independent right, and he had an interest in getting in and collecting their debts; he therefore cannot be considered as a stran-

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ger: and perhaps he might have been authorized to sue in the name of the firm. A receiver has power to dis-train for rent—*Hughes v. Hughes* (a); he may also bring an action of ejectment by leave of the Court; and in *Wynne v. Lord Newborough*, Lord *Thurlow* said (b)—“A receiver is to let the estate to the best advantage;” it there-fore follows, that, in this case, the plaintiff had authority to sue for all debts due to the firm. A breach of duty or excess of authority by the plaintiff is not now to be presumed: besides, the defendant admitted his authori-ty as receiver when he gave him the guarantia. The master of a ship may sue those who contract with him, although the supplies are furnished on account of the owners.

The forbearance of the plaintiff to adopt legal proceed-ings against *Charles Kennedy*, was a good consideration for the defendant's promise. In *Longridge v. Dorville* (c) it was held, that the giving up a suit instituted for the purpose of trying a doubtful question, was a good consi-deration to support a promise to pay a stipulated sum. Mr. Justice *Holroyd* there said (d)—“Any act of the plaintiff from which the defendant derives a benefit or advantage, or any labour, detriment, or inconvenience is sustained by the plaintiff, is a sufficient consideration to support a promise:” and, in *Stracey v. The Bank of England* (e), an engagement by the Bank of *England* to replace stock without any litigation on their part, was held to be a sufficient consideration to support a promise to endeavour to enforce proof against the estate of a bank-rupt; and the case of *Longridge v. Dorville* was there re-ferred to as an authority in favour of the validity of such an agreement. In this case the plaintiff might have incur-red a detriment by giving time to the original debtor with-out the consent or sanction of the creditors.

(a) 1 Ves. jun. 161.

(d) Id. 122.

(b) Id. 165.

(e) 4 Moore & Payne, 639; S.

(c) 5 Barn. & Ald. 117.

C. 6 Bing. 773.

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Mr. Serjeant *Cross*, in support of his rule.—The plaintiff had no authority to make this contract with the defendant, and he has not shewn on the face of the declaration that he was authorized to bring this action; he merely alleged that he had been appointed by the Court of *Chancery*, receiver of the debts due to the firm of *Boeme & Smout*, by means whereof *Charles Kennedy* became liable to pay him as such receiver. The consideration, as well as the situation and relative characters of the contracting parties must be looked at. The only purpose for which the plaintiff was appointed a receiver was simply to collect debts; his office is not known to a Court of common law: he is an agent or officer of the Court of *Chancery*, by whom he was appointed. Instead of receiving the money due from *Charles Kennedy* to his creditors, he entered into a collateral contract with the defendant, a perfect stranger, and that, too, in his own name, and on his own behalf, without consulting the parties for whom he was appointed receiver. The plaintiff should at least have shewn that he was authorized to sue *Charles Kennedy*; and if his creditors, *Boeme & Smout*, had brought an action against him, it would be no answer for him to say that their receiver had engaged not to adopt any legal proceedings against him for two months. Those words have no precise or definite meaning; and the plaintiff had no interest whatever in making such a contract, which is *nudum pactum*, and void as against the defendant. Neither has the plaintiff shewn that he has been injured or prejudiced by the contract; he parted with nothing; but exceeded his duty as a receiver: he was only authorized to collect debts, and therefore he could not contract to forbear the enforcing payment from a debtor, or enlarge the time for payment. There is, consequently, no consideration for the defendant's promise: and it is quite clear that he could derive no benefit from the contract.

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LORD CHIEF JUSTICE TINDAL.—I am of opinion that there is no ground for arresting the judgment on the second count in this declaration, which commences by alleging that one *Charles Kennedy*, before and at the time of the making of the promise of the defendant thereafter next mentioned, was indebted to certain persons commonly called and known by the name and using the style and firm of *Boone & Sweet*, in the sum of 25*l.*; that the plaintiff, while *Charles Kennedy* was so indebted, had been appointed by the High Court of Chancery receiver of the debts and moneys then due to the firm, by means whereof *Charles Kennedy* became liable to pay the plaintiff, as such receiver, the said sum so due by *Charles Kennedy* to the firm, when he should be thereunto requested. There is, therefore, a distinct allegation of *Charles Kennedy's* liability to pay the plaintiff on request. It has been objected, that this Court cannot take judicial notice of the character or office of a receiver. But the plaintiff has alleged that he was receiver, and it appears on the face of the record; and after verdict we may assume that he paid the obligation of *Charles Kennedy* to pay him as such receiver, and that he had a right to enforce payment to himself in that capacity whenever he thought proper. It has been further objected that there is no consideration for the defendant's promise; as to which, it appears to me to be sufficient to observe that the plaintiff did not interfere as a stranger in the concerns of the firm; for, when he was appointed receiver, it was a duty incumbent on him to require *Charles Kennedy*, the original debtor, to pay, and it was also the duty of the debtor to pay him. The defendant must have known that the plaintiff had been appointed receiver; and the contract to forbear to take any legal proceedings against the original debtor, was a contract from which the plaintiff might receive a detriment. It is a sufficient consideration for a contract, if one party receives a benefit, or the other is exposed to any loss or detriment

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from it. If the plaintiff had been guilty of improper conduct in giving time to the debtor, he would no doubt have been responsible to the firm of *Boeme & Smout*, the creditors; for whom he was appointed receiver; and therefore it might have been a detriment to him to forbear to take legal measures against *Charles Kennedy*, when his duty was to require payment in the first instance. It is quite clear that *Boeme & Smout* could not have put this contract in suit against the defendant, as they were no parties to it; neither does it appear that they assented to give time for payment to *Charles Kennedy*; and, as he had the benefit he sought by the undertaking of the defendant, it would be too much to say that the latter should not be amenable either to the receiver of the creditors; it would be inconsistent with the honesty of the case, and contrary to principle, law, and justice. It seems to me, that, after various objections, the plaintiff has sufficiently shewn that he is concerned with the subject-matter of this suit in his character of receiver; and there is consequently no ground for considering him as a stranger. I therefore think that neither of the objections ought to avail, and that the rule for arresting the judgment must be discharged.

1000 (do not)

MR. JUSTICE GASLIER.—I am of the same opinion. It does not follow, that, when a person is appointed a receiver, it is his duty immediately to collect the debts due to the party for whom he is appointed, or to sue for them directly; he has a right to exercise a reasonable discretion, and not to run the hazard of bringing an action against the debtor, without first ascertaining whether the result might be beneficial or not. Here, if the plaintiff in his character of receiver has done wrong by giving time to the debtor, he is liable to the parties who caused him to be appointed, or he may be responsible to the Court by which he was appointed. Although the defendant has

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received no benefit from the plaintiff's forbearance to sue *Charles Kennedy*, yet, by giving him time, the plaintiff has incurred a responsibility, which is a sufficient detriment to form a good consideration for the defendant's promise.

MR. JUSTICE BOSANQUET.—I am also of opinion that there is no ground for arresting the judgment in this case. It has been objected that the plaintiff cannot maintain this action, as he had no authority to sue the defendant. The contract was made with him, not as the agent of *Boone & Smout*, the creditors, but in his personal character of receiver; and, if the contract be a valid contract, there can be no doubt but that the plaintiff is entitled to sue in his capacity of receiver. It has been further said, that it does not appear that the plaintiff had any authority to make the contract in question, as it was his duty to collect all debts due to the firm, and not to give time to the debtors. But it appears to me that it is not inconsistent with the duty of a receiver to exercise forbearance towards a debtor; he must use a reasonable discretion, and such a forbearance is not of itself incompatible with the duties of his office. Now, what have the parties contracted to do? The plaintiff was authorized to receive all debts due to the firm, and he agreed not to adopt any legal proceedings against one of the debtors for a period of two months, in consideration of the defendant's promising to pay the plaintiff the amount of the debt at the expiration of that time, if it should be then unpaid by the original debtor. That appears to me to be an advantage to the creditors, and not an unreasonable exercise of discretion. With respect to the want of consideration for the defendant's promise, the forbearing to sue the original debtor was clearly a benefit and advantage to him, and might have been a detriment to the plaintiff.

MR. JUSTICE ALDERSON.—I am of the same opinion.

The plaintiff has alleged in the second count of the declaration, that he was appointed by the Court of Chancery receiver of the debts due to the firm of *Boeme & Smout*; that *Charles Kennedy* was indebted to them, and became liable to pay the plaintiff, as such receiver, the sum so due to the firm, when he, *Charles Kennedy*, should be there-to requested; and that the plaintiff, at the request of the defendant, agreed not to adopt any legal proceedings against *Charles Kennedy* for two months, on the defendant's undertaking to pay the amount of his debt at the expiration of that period, in case he should omit to do so. That is a sufficient consideration for the defendant's promise; and, as against him, we must assume that the plaintiff had authority to do that which the defendant requested him to do, namely, to forbear to sue *Charles Kennedy*, on the defendant's undertaking to be liable for the payment of his debt. This rule, therefore, must be—

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Discharged.

HAMILTON, Demandant; FARRER, Tenant; WILSON,
Vouchee.

Friday,
Nov. 4th.

MR. Serjeant *Russell* moved to amend this recovery, which was suffered at bar, in *Michaelmas Term*, 1782, by transposing the names of the demandant and tenant, pursuant to the deed to make a tenant to the *præcipe*, which was dated on the 27th *November*, 1782, and according to which *Farrer* was to be the demandant, and *Hamilton* tenant. It was also sworn, that it was the intention of the parties, that *Farrer* should be the demandant, and *Hamilton* tenant; and that possession had gone according to the deed ever since. The learned Serjeant referred to the case of *Lord*, demandant, *Biscoe*,

A recovery may be amended, by transposing the names of the demandant and tenant, although the deed to make a tenant to the *præcipe* was dated on the last day but one of the term in which the recovery was suffered.

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tenant, *Ayles*, vouchee (a), where a rule was made absolute to amend a recovery, by transposing the names of the demandant and tenant, pursuant to the deed to make a tenant to the *precipe*—*Roberts*, demandant, *Robinson* tenant (b), where the Court permitted the writs of entry (c) and seisin, and the recovery roll, to be amended, by transposing the names of the demandant and tenant—*Loggin*, demandant, *Robbins*, tenant, *Pullen* and wife, vouchers, where the Court said (c)—“The intention of the parties is the foundation for the amendment. The principle upon which the Court goes, is the statute 6 Hen. 6, to amend the misprision of the clerk. A *precipe* is the court’s instructions for an actual writ; a deed of uses is the clerk’s instruction for a recovery; and here the deed is right. But far more important amendments have been allowed than that now sought for. In *Douce*, demandant, *Lloyd*, tenant, *Reeser*, vouchee (d), a writ of entry (e), and the subsequent proceedings, were amended by inserting the words “all manner of tithes.” In *Milbank v. Jolliffe* (f), an advowson was allowed to be inserted, in order to carry into effect the intention of the parties; and in *Rees*, demandant, *Froud*, tenant, in the last Michaelmas Term, the Court allowed an amendment similar to the present;

Mr. Serjeant *Wilde*, for the son and heir of the vouchee, shewed cause in the first instance, and opposed the amendment, on the grounds that it was not reasonable, and also that it was in express contradiction to the deed to lead the uses. In *Allen*, demandant, *Healey*, tenant, *Massey*, vouchee (g), the Court refused to allow a similar amendment to be made, the documents being lost, but

(a) Barnes, 24.

(b) 2 Taunt. 222.

(c) Barnes, 81.

(d) 2 Bos. & Pul. 578.

(e) It is now settled, that this Court has no power to amend the

writ of entry. The application for this purpose must be made to the Master of the Rolls.

(f) 2 Bos. & Pul. 580, n.

(g) 6 I. B. Moore, 46.

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Demandant.

here there is a total variance between the deed to lead the use and the other documents; and the principle that the Court attends the misprision of the clerk, cannot apply to this case; as the recovery was suffered at bar. The tenant had no interest in the estate at the time of the recovery, and the deed to make a tenant to the *præcipe* did not exist at the time it was suffered, as it was dated on the 25th November, and the recovery had relation to the first day of Michaelmas Term, viz. the 6th November. There was consequently no misprision by the clerk; and although, in *Goodright v. Burton v. Rigby* (a), it was held that, by the statute 14 Geo. 2, c. 20, a recovery is good if the deeds making a tenant to the *præcipe* appear to have been executed at any time within the term in which the recovery is suffered, though such execution should appear to be subsequent, not only to the judgment and award of the writ of seisin, but also to the execution of that writ; yet that only applies to cases where the person joining in the recovery has a sufficient estate in him to suffer the same; and here the deed was not conformable to the recovery. If the tenant could be substituted for the demandant, without any authority to warrant such a proceeding, it would have the effect of falsifying the records of the Court, and, in fact, substituting a new recovery. But the recovery is consistent in all its parts as it stands, with the exception of the deed. The Court, therefore, will infer, that the mistake is in that instrument, particularly as it was not executed until after the recovery was suffered. In all the cases which have been referred to in support of the application, the amendments were made with the consent of the parties, and without any opposition.

Mr. Serjeant Russell, in reply.—It is quite clear that the tenant in tail meant to suffer a recovery; and the Court

(a) 2 Dow, 250.

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HAMILTON,
Demandant.

will do substantial justice by allowing the amendment as prayed, particularly as the possession has gone according to the deed ever since the recovery was suffered—a period of fifty years. The case of *Allen*, demandant, *Hexley*, tenant, cannot be considered an authority against the application, as there there was a warrant of attorney, which is a deed of the party, and, as it could not be found, there was strong ground to presume fraud. Here, the deed to make a tenant to the *præcipe* was executed and inrolled in the same term in which the recovery was suffered; and there is consequently no ground for the objection which has been raised in that respect.

Lord Chief Justice TINDAL.—I think this amendment ought to be allowed, and that, by allowing it, we shall violate no general rule of law, whilst we shall carry into effect the obvious intention of the parties. There can be no doubt but that a recovery was intended to be suffered by the tenant in tail, and the *dramatis personæ* necessary to carry it into effect are admitted. The only question then is, whether the formal parts of the proceeding have been complied with, and are sufficient, after fifty years' possession in conformity with the deed. Can we, then, consistently with the intention of the parties, allow the names of the demandant and tenant to be transposed? The case of *Lord*, demandant, *Biscoe*, tenant; is an authority directly in point; there the application for the amendment was opposed. Although it may be said, that, in that case the deed to make the tenant to the *præcipe* was executed anterior to the recovery, so that there was something to amend by, and the deed here bears date on the 27th November, and that, in contemplation of law, the recovery had relation to the first day of Michaelmas Term, viz. the 6th November, yet the deed might have been executed before the day of its date; and, even if it had been executed on the 27th, there was only an interval of three

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weeks; and the statute 14 Geo. 2, c. 20, s. 6, enacts, that every recovery shall be deemed good and valid, provided the deed making the tenant to the *præcipe* appears to be executed before the end of the term in which such recovery was suffered. A deed, therefore, executed subsequently to the recovery, if in the same term, is put on the same footing as a deed executed before; and the clause in the act being remedial, must receive a liberal construction, and we are bound to give it full effect. Here, therefore, there is something virtually to amend by, and the mistake might be attributable to the misprision of the clerk. This case appears to me to fall within the principle laid down in *Loggin*, demandant, *Rawlins*, tenant, and I am glad that that case was referred to. Fifty years have now elapsed since the recovery was suffered, and possession has ever since gone according to the deed, and there can be no doubt but that justice will be answered by allowing the amendment prayed.

Mr. Justice GASLÉE.—I am of the same opinion. It does not appear to me to be necessary to have recourse to the statute 14 Geo. 2, for, the deed to make the tenant to the *præcipe* might have been executed before the day on which it is dated, or before or on the day the recovery was suffered, particularly as a party may appear and suffer a recovery at bar even on the last day of term.

Mr. Justice BOSANQUET.—The recovery in this case might have been suffered at bar by the tenant in tail on the 28th November. We ought to facilitate an amendment of this nature, where the possession has gone according to the deed for so long a period.

Mr. Justice ALDERSON.—There can be no doubt but that the parties intended that a valid recovery should be effected, and that the tenant in tail appeared at bar for

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the purpose of suffering it. The only error is in substituting the name of the tenant for that of the demandant, and is of the same nature as putting *John Doe* by mistake *Richard Roe*.

Fiat (a).

(a) See *Cox*, demandant, *Ince*, Moore, 257; S. C. 1 Bing. 22. tenant, *Gill*, vouches, 7 J. B.

Friday,
 Nov. 4th.

By an order of *Nisi Prius*, the cause and all matters in difference between the parties were referred to the arbitration of a surveyor, who found, that, on the balance of accounts between the plaintiff and defendant, the latter had overpaid the former 34*l*. —The Court refused to grant an attachment against the plaintiff, for non-payment of the sum awarded.

THORNTON v. HORNBY.

BY an order of *Nisi Prius*, this cause, and all matters in difference between the parties, were referred to the arbitration of a surveyor, and, by the terms of the order, the costs were to abide the event of the award. The arbitrator stated on the face of his award, that he had investigated the accounts between the parties, and that the defendant had produced a rule of Court, by which it appeared that he had paid into Court the sum of 600*l*.; and the arbitrator thereupon awarded and determined that the defendant, on the balance of accounts between him and the plaintiff, had overpaid the plaintiff the sum of 34*l*.

Mr. Serjeant *Andrews*, in the last term, obtained a rule *nisi* for an attachment against the plaintiff, for the non-payment of the last-mentioned sum, pursuant to the award.

Mr. Serjeant *Jones*, on a former day in this term, shewed cause.—The award is bad on two grounds—*first*, it is not final—*secondly*, it is void for uncertainty. The arbitrator should have adjudged the cause, and also the matters

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&
HORNEY.

in difference separately, but he has merely found, and awarded that the defendant has overpaid the plaintiff 34*l.* on the balance of accounts. That sum might have been overpaid upon a general balance of accounts on other matters in difference between the parties not before the arbitrator, and the plaintiff might have remained unpaid as to the subject-matter of this suit; and if the arbitrator had adjudicated on the cause and the matters in difference separately, the balance of the account might have been in favour of the plaintiff. If several distinct matters are referred to an arbitrator, he must determine each of them, and make his adjudication accordingly. In *Randall v. Randall (a)*, upon a reference of all actions, controversies, &c., and also of two distinct matters of difference, it was held, that, if the arbitrator omitted to decide one of such distinct matters, it vitiated the whole award; and therefore, that it could not be enforced by attachment; and here, if the sum of 34*l.* is to be considered as overpaid in the action, then there was no determination of the matters in difference. But the arbitrator has not found on what account the sum was overpaid; and the plaintiff might be entitled to a verdict, and the costs of this cause, independently of the other matters in difference. In the case of the *Highgate Archway Company v. Nash (b)*, where a cause and all matters in difference were referred, and the costs of the cause were to abide the event, and the arbitrator directed a verdict to be entered for the plaintiff, but, that they should not take out execution for the debt until they had paid a larger sum to the defendant; it was held that the plaintiffs might, notwithstanding, take out execution for the costs.

Mr. Serjeant *Andrews*, in support of his rule.—It may

(a) 7 East, 81. (b) 2 Barn. & Ald. 597.

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v.
HOBBY.

be admitted as a general principle, that, if several distinct matters be referred to an arbitrator, he must adjudicate on all. In *Randall v. Randall*, two distinct specific matters were referred, and the arbitrator altogether neglected to notice one of the subjects of reference which was expressly stipulated for. Here, however, the cause, and all matters in difference, were referred generally to the arbitrator. Certain disputed accounts between the parties were the subject-matter of the action; and the arbitrator has found that the defendant had overpaid the plaintiff 34*l.* on the balance of such accounts. The award, therefore, is sufficiently certain, and is in substance the same as if the arbitrator had found that the plaintiff had no cause of action against the defendant.

The Court said that they were reluctant to set aside the award; and, on its being handed up to them, they took time to consider until this day, when—

Lord Chief Justice TINDAL said, that the Court thought that there was sufficient doubt upon the face of the award to justify the refusal of an attachment, particularly, as the defendant, if he should think proper, had his remedy by action.

Rule discharged.

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Saturday,
Nov. 5th.

PLANCHE v. COLBURN and BENTLEY.

THIS was an action of *assumpsit*. The plaintiff, in his declaration, alleged that he had been employed by the defendants to write for them for publication in a periodical work called *The Juvenile Library*, a treatise upon ancient costume and armour; and that, on the delivery of the treatise by the plaintiff to the defendants, they undertook and faithfully promised to pay him the sum of 100*l*. The plaintiff then averred, that he, confiding in such promise, commenced and made considerable progress in writing the treatise; and that, although he was ready and willing to complete and deliver the whole to the defendants for publication in *The Juvenile Library*, yet that the defendants refused to publish it in that work, and also neglected to pay the plaintiff the said sum of 100*l*. so agreed to be paid to him as aforesaid. To this were added counts for work and labour, and on a *quantum meruit*, and the usual money counts.

The plaintiff contracted for a certain sum to write for the defendants a treatise to be published in a periodical work called *The Juvenile Library*. Before the completion of the treatise, the defendants ceased to publish *The Juvenile Library*:—*Held*, that the plaintiff might recover on a *quantum meruit* for the part of the work he had done, notwithstanding he had neither delivered nor tendered the treatise, or any part of it.

At the trial, before Lord Chief Justice *Tindal*, at *Westminster*, at the Sittings after the last term, the plaintiff proved the contract with the defendants, who were book-sellers and publishers, as alleged in the declaration; and that he had commenced and written a considerable portion of the treatise, and had incurred expenses in going journeys and inspecting ancient armour, and making drawings for the work; but he did not prove that he had ever tendered or delivered any part of the treatise to the defendants. But it appeared, that, after they had published three volumes of *The Juvenile Library*, they abandoned the work altogether, as it did not succeed according to their expectations. The defendants' clerk said that he had heard the plaintiff say that he would finish his treatise, if the defendants would undertake to publish it separately and as a distinct work. His Lordship left it to the Ju-

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ry to say—*first*, whether the work called *The Juvenile Library* had been abandoned by the defendants—*secondly*, whether the plaintiff had entered into a new contract as to the publication of his work as a distinct treatise. The Jury found that the defendants had abandoned their work, and that the plaintiff had not entered into any new contract: and they returned a verdict for him, damages 50*l*.

Mr. Serjeant *Spankie* now applied for a rule *nisi* that this verdict might be set aside, and a nonsuit entered, or a new trial had, on the ground that the plaintiff could not be entitled to recover on the special contract, as he had not tendered or delivered the whole of his work to the defendants, or even a part of it, and he was not to be paid until he had completed and delivered the whole of the treatise.—Although the publication of *The Juvenile Library* was suspended for a time, it does not follow that it was abandoned or given up altogether; and the defendants recommended the plaintiff to have his treatise published as a separate and distinct work, to which he at first assented, although he afterwards refused to do so. Neither could the plaintiff recover on the *quantum meruit* count, as he was bound by his contract to complete and deliver the whole of his work, and he did not shew that the defendants had ever dispensed with his writing or completing the treatise, and he was bound to finish and deliver it in a complete state before he could call on the defendants for payment.

Lord Chief Justice TINDAL.—I agree, that, when a special contract is open and in existence, a party suing for a breach of it, cannot recede and seek to recover on a *quantum meruit* for the work and labour done. But the question here is, whether the contract remained in existence or not. That was a question purely for the consideration of the Jury, and they found that the work was

finally abandoned, which they were fully warranted in doing; as it appeared, that, after three volumes of *The Juvenile Library* had been published, the work was given up and utterly abandoned. The defendants' clerk merely proved a conversation between the plaintiff and defendants as to publishing his treatise separately. I therefore left it to the Jury to say whether the original contract was abandoned by the defendant, or a new contract had been entered into. They found that there was no new contract: and I think the damages found for the plaintiff are not unreasonable, and that he ought not to be deprived of the fruit of his labour in writing a great part of the treatise, which he satisfactorily proved he had done. Part of the defendants' contract was to publish the plaintiff's treatise in the work called *The Juvenile Library*, which was a periodical publication: and the plaintiff might not have taken so much pains if his treatise were to be published separately, as if it were to be circulated through the medium of a popular work.

Mr. Justice GASELEE.—There is no dispute as to the law in this case, nor is there any objection to the mode in which the questions were left to the jury. If, indeed, the declaration had contained no other count than that founded on the special contract, the plaintiff could not have succeeded, as by the terms of the agreement he was not to be paid till he had delivered the whole of his treatise. The Jury found that the publication of *The Juvenile Library* was wholly abandoned by the defendants. The plaintiff, therefore, is entitled to a remuneration for the part of the work he had executed, and was ready to deliver.

Mr. Justice BOSANQUET.—I am of opinion that the plaintiff is entitled to retain his verdict for the labour and attention bestowed in performing part of his work, which was to be published by the defendants, and circulated in a particular manner, namely, in a periodical work,

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which the Jury found had been altogether abandoned by the defendants; and if they neglected to publish the treatise in *The Juvenile Library*, the plaintiff was not bound to go on and complete it; for, an author who is engaged in writing a literary work does not merely look to a pecuniary compensation, but chiefly to his reputation.

Mr. Justice ALDERSON concurred.

Rule refused.

Tuesday,
 Nov. 8th.

The caption of a fine in *Scotland* must be taken before advocates or clerks to the signet.

Where one of the commissioners was only an attorney of a *Scotch* Court, the fine was not allowed to pass.

ANONYMOUS.

MR. SERJEANT *Wilde* moved that this fine might pass, notwithstanding the caption, which had been taken in *Scotland*, was not taken before two advocates or clerks to the signet; one of the commissioners being an attorney of the Court of *Lanark*, and not an advocate or clerk to the signet.

But the Court referred to the rule of *Michaelmas*, 39 *Geo.* 3, by which it was ordered (a) "that no fine should be suffered to pass, unless the caption were taken before one of the Justices or Barons of his Majesty's Courts of record in *Westminster-Hall*, or one of the Serjeants at Law; or unless an affidavit were made and filed, stating that the commissioners taking the same were either barristers of five years' standing, or solicitors or attorneys of some of the Courts of *Westminster-Hall*, the Judges of the Court of *Session* and *Exchequer*, or advocates and clerks to the signet of five years' standing, in *Scotland*."

The learned Serjeant, therefore, took nothing by his motion,

(a) 1 Bos. & Pul. 362.

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**CORRETT and Another, Assignees of BIRD, a Bankrupt,
v. COCHRANE.**

Thursday,
Nov. 10th.

THIS was an action of *assumpsit*, and brought by the plaintiffs, as assignees of *Bird*, a bankrupt. The declaration contained counts for goods sold and delivered, work and labour, and the common money counts; in all of which the promises were stated to have been made by the defendant to *Bird*, before his bankruptcy. The declaration concluded as follows:—"Wherefore the said plaintiffs, *assignees as aforesaid*, say that they are injured, and have sustained damage to the value of 100*l.*, and therefore they bring their suit, &c."

Plaintiffs declared as assignees of a bankrupt, concluding as follows:—"wherefore the said plaintiffs, *assignees as aforesaid*, say they are injured, &c."—*Held* good, on special demurrer, as the words "*assignees as aforesaid*," might be rejected as surplusage.

Special demurrer, assigning for causes, that the plaintiffs do not appear, in or by the declaration, to have any other cause or causes of action against the defendant, except those arising to them as the assignees of *Bird* therein mentioned, so that no damage can have arisen to them except as such assignees; nevertheless it is not stated or alleged in and by the conclusion of the said declaration, that the plaintiffs are injured *as* such assignees, or have, *as* such assignees, sustained any damage; but it is merely stated that the plaintiffs, *assignees as aforesaid*, are injured, and have sustained damage to the value of 100*l.*

The cause now came on for argument.

Mr. Serjeant *Merewether*, in support of the demurrer.—As the plaintiffs had no cause of action against the defendant, except in their character of assignees, the declaration is informal, because the plaintiffs have declared as assignees, yet they have not alleged that they have sustained damage *in that capacity*; the only averment of damage being to themselves *personally*, which

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cannot be joined in the same action. In *Brigden v. Parkes* (a), the three first counts of a declaration in *assumpsit* against executors, stated promises made by the testator, the fourth was for money had and received by the defendants, "*as such executors as aforesaid*," stating a promise to pay by them "*executors as aforesaid*," and the last was upon an account stated by the defendants, "*executors as aforesaid*," and stating the promise to pay in the same manner: this was held to be bad on general demurrer. In *Henshall v. Roberts* (b), it was held that a count upon an account stated with the plaintiffs, *executrix*, &c. (not stating *as executrix*, &c.), could not be joined with counts on promises to the testator, for it was no allegation that the promises were made to the plaintiffs in their representative capacity; and that, under such a count, proof might be given of an account stated with her in her individual character. Here, the word *as*, at the end of the declaration, was most material, and its omission is a substantive ground of objection, and may be taken advantage of on special demurrer.

Mr. Serjeant *Wilde*, *contra*, was stopped by—

The Court, who thought that there was nothing in the objection, for that, if the words "*assignees as aforesaid*," were struck out at the conclusion of the declaration, it would be sufficient, for the plaintiffs alone could be entitled to recover; and, as they only claimed as assignees, and stated that they had sustained damage, the words "*assignees as aforesaid*" might be rejected as surplusage.

Judgment for the plaintiffs.

(a) 2 Bos. & Pul. 424.

(b) 5 East, 150.

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BOOTY, Demandant; CAMERON, Tenant; NORTH & Wife,
A. M. CHALMERS, and JOHN CHALMERS, Vouchees.

Friday,
Nov. 11th.

THE warrant of attorney of the vouchee, *John Chalmers*, was taken in *Jamaica*, before two commissioners under a *dedimus potestatem*. The names of *North* and wife, and *A. M. Chalmers*, did not appear in the warrant of attorney or *dedimus*, but the name of *John Chalmers* alone, the three first named vouchees having appeared at bar.

In a recovery, three of the vouchees appeared at bar, and the warrant of attorney of the fourth was taken before commissioners in *Jamaica*:—*Held*, that the names of the three former need not appear in the *dedimus* and warrant of attorney.

Mr. Serjeant *Taddy* now moved that the recovery might pass, and referred to the case of *Simmons* and three others, vouchees (a), where it was decided, that, if one of several vouchees appear personally at bar, and the others by attorney, the name of the former need not be inserted in the *dedimus* or warrant of attorney.

Lord Chief Justice TINDAL.—I think the more correct course would have been to have inserted the names of all the vouchees in the *dedimus* and warrant of attorney; but the case to which we have been referred is precisely in point.

Mr. Justice GASELEE.—In the case cited, Mr. Justice *Burrough* said—"One of several vouchees may appear personally at bar, though the others appear by *dedimus*; and he being in Court, no warrant of attorney can be required for him." That appears to me to be founded on common sense, and there is no incongruity on the face of the proceedings. Besides, here, all appears to have been done regularly: for the appearance at bar was in the face of the Court.

Mr. Justice BOSANQUET.—I am happy to find that there

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Demandant.

is an authority in support of this application, which is precisely in point.

Fiat.

Saturday,
Nov. 12th.

The plaintiff obtained a verdict, which was afterwards set aside on the ground of misdirection, and a new trial granted, the costs to abide the event. On the second trial, the cause was referred, and the arbitrator ultimately directed that the verdict should be entered for the defendant, each party paying his own costs of reference:—*Held*, that the defendant was only entitled to the costs of the second trial.

It is only where the same party succeeds on both trials, that he is entitled to the costs of both.

SHERLOCK v. BARNARD.

THE plaintiff obtained a verdict at the last Summer Assizes at *Lancaster*; the defendant, in the last *Michaelmas* Term, obtained a rule *nisi* to set it aside and have a new trial, on the ground of a misdirection by the learned Judge to the jury. The Court made the rule for a new trial absolute, and ordered that the costs of the former trial should abide the event of the second, and the rule was drawn up accordingly. At the last Assizes at *Lancaster*, the cause, and all matters in difference, were referred to an arbitrator, who directed a verdict to be entered for the defendant. On the taxation of costs before the Prothonotary, he only allowed the defendant the costs of the last trial, the arbitrator having awarded that each party should pay the costs of the reference.

Mr. Serjeant *Wilde*, in the last term, obtained a rule *nisi* for the Prothonotary to review his taxation, on the ground that the defendant was entitled to the costs of both trials.—The learned Serjeant, after referring to *Chapman v. Partridge* (a), *Goodtitle d. Bremridge v. Walter* (b), and *Brown v. Boyn* (c), submitted that this case was distinguishable, as the plaintiff obtained a verdict at the first trial in consequence of the misdirection of the Judge, and, therefore, that the defendant was entitled to a new

(a) 2 New Rep. 382.

(b) 4 Taunt. 671.

(c) 5 J. B. Moore, 309.

trial as a matter of course; and that the rule should have been drawn up generally, and without any mention of costs.

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Mr. Serjeant *Jones* now shewed cause.—The cases of *Chapman v. Partridge* and *Brown v. Boyn* are decisive to shew, that, in this Court, where one party has obtained a verdict, and on a new trial being granted the costs of the former trial are directed to abide the event of the new trial, and on the second trial the verdict is for the other party, the latter is only entitled to the costs of the second trial. It is only in cases where the same party succeeds on both trials that he is entitled to the costs of both.

Mr. Serjeant *Wilde*, in support of his rule.—In *Chapman v. Partridge*, the Court thought that the words of the rule ought to be construed with reference to the question which must have been depending, namely, whether the new trial should be granted upon payment of the costs of the first by the defendant. The case of *Brown v. Boyn* was decided on the principle of *Chapman v. Partridge*. There, the Court ordered a new trial, on the ground that the verdict was against evidence, and said, that, if a verdict be given against evidence, it can only be disturbed on payment of costs. Here, however, the plaintiff obtained a verdict at the first trial through the misdirection of the Judge; and, the arbitrator having ordered a verdict to be entered for the defendant, it must be assumed that the plaintiff had no cause of action against him. He therefore ought, in justice, to be indemnified for all the costs and expenses he has incurred. If the attention of the Court had been called to the point of misdirection, they would not have ordered the costs of the first trial to abide the event of the second.

Lord Chief Justice TINDAL.—I think we ought to ad-

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here to the rule generally received in this Court, and universally adhered to in the Court of *King's Bench*, viz. that a party who fails on a first trial but succeeds on a second, is only entitled to the costs of the second trial; and here there has been no explicit bargain between the plaintiff and defendant to take the case out of the ordinary rule. A new trial was applied for by the defendant, on an alleged misdirection of the Judge to the jury; and the Court, feeling some doubt upon the point, ordered a new trial: and, as the defendant came to ask a favour, we imposed on him the terms that the costs of the first trial should abide the event of the second, in order to insure to the plaintiff the costs of both in case he should succeed a second time. The result of the decisions in both Courts is, that, where the costs are ordered to abide the event of the second trial, if the same party succeed in both trials, he shall have the costs of the first as well as the second; but otherwise the costs of the first shall not be allowed. It is entirely in the discretion of the Court whether or not they will compel a party applying for a new trial to pay costs as a condition precedent to a second trial.

Mr. Justice GASELER.—Formerly, there was a variance between the practice of this Court and the Court of *King's Bench* where the rule for a new trial was silent as to costs. In that Court, the costs of the first trial were not generally allowed, whichever way the verdict might go upon the second; but, in this Court, where a new trial was granted, and the rule was silent as to costs, if the verdict on the second trial went the same way, the party succeeding was entitled to the costs of both trials; but if the verdicts went different ways, the party ultimately succeeding was not entitled to the costs of the first trial. Where, however, the costs were directed to abide the event of the suit, as by the terms of the rule in this case, there has never been any

variance in the practice. It is not for us to inquire whether there was any bargain between the parties with regard to the costs ultimately to be recovered; and, if there had been, it should certainly have been so expressed on the rule.

Mr. Justice BOSANQUET.—The costs of the former trial having, by the terms of the rule, been directed to abide the event of the suit, as the plaintiff succeeded on the first trial, the defendant is only entitled to the costs of the last. If, indeed, the defendant had obtained a verdict in both, he would have been entitled to the costs of both, but not otherwise.

Mr. Justice ALDERSON.—I have always considered, that, where there is a condition imposed by the Court that the costs of a former trial shall abide the event, it is in favour of the applicant for a new trial; and the party who has a verdict in his favour is not bound to come to any terms with respect to the costs which may be ultimately recovered. Nothing can be more detrimental to the party succeeding in the first trial, than granting a new trial; and, looking at the terms of the rule in this case, and the relative situation of the parties, I fully concur with the Court, that the defendant is only entitled to the costs of the last trial. The Prothonotary was quite right in allowing him those costs only. This rule, therefore, must be—

Discharged.

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v.
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1831.

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The Court allowed a fine to pass, where one of the commissioners had omitted to indorse his name on the *dedimus*.

MARKHAM, Plaintiff, BAYLEY, Deforciant.

MR. Serjeant *Scriven* moved that this fine might pass. The acknowledgment had been taken in the *West Indies*, before two commissioners, under a *dedimus potestatem*. The *præcipe* and concord were signed by both the commissioners, who made the usual affidavit; but one of them had omitted to indorse his name on the *dedimus*. The learned Serjeant referred to the case of *Graham*, plaintiff, —, deforciant (a), where the Court held, that, in taking the caption of a fine abroad, referring to the schedule on the back of the *dedimus*, such schedule must be signed by the commissioners; but, in this case, as one of the commissioners had indorsed his name on the *dedimus*, it was sufficient.

The Court being of that opinion—

Fiat.

(a) 4 J. B. Moore, 295.

Saturday,
Nov. 12th.

THORNE v. The Marquis of LONDONDERRY.

The Court refused to discharge a rule for a special jury in a *Middlesex* cause, on the ground that the rule had not been served, or the cause marked as a special jury cause two days before the adjournment day of the last Sittings, as re-

quired by the rule of Court (*Trin. 52 Geo. 3*): but they directed the cause to be set down for trial on the first day fixed for taking special jury causes, upon the terms of the defendant's giving judgment of the term, and bringing up certain witnesses (his servants) subpoenaed by the plaintiff.

THIS was an action of trespass, for an assault committed by the defendant upon one of his female servants. The cause was entered for trial by a common jury, at the Sittings after the last term, and was twice called on, but postponed on a representation by the defendant's counsel that it would occupy a considerable time, as it was necessary to call a great number of witnesses; in consequence of which, the cause was made a remanet to the Sittings in this term.

Mr. Serjeant *Jones*, on a former day, having obtained a rule for a special jury, on an affidavit which stated that the defendant believed he would thereby have a more impartial trial than if the cause were tried by a common jury.

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Mr. Serjeant *Wilde* now moved to discharge that rule, on the ground that the rule of Court (a), which requires the rule for a special jury in a *Middlesex* or *London* cause, to be served, and the cause marked in the marshal's book as a special jury cause, two days previous to the adjournment day, had not been complied with; as the defendant had not made any application before the adjournment day of the last Sittings, and it was now merely sworn that it was believed he would have a more impartial trial by a special jury.

The Court said, that they would not enter into the particular circumstances of the case, but that the defendant might be allowed to try his cause by a special jury, upon condition of setting it down for trial on the first day fixed for taking special jury causes after the term, of giving judgment of the term, and bringing up certain of his servants as witnesses, whom the plaintiff had subpoenaed to attend at the former trial.

On these terms being acceded to by Mr. Serjeant *Jones*, the rule for discharging the rule for a special jury was—

Discharged.

(a) *Trinity Term*, 52 Geo. 3: 4 Taut. 600.

1831.

Saturday,
Nov 12th.

HEPWORTH v. SANDERSON.

A mandate was issued by the sheriff of York, directing the bailiff of a liberty within that county to take the defendant on a *ca. sa.* The bailiff took the defendant and carried him to the county gaol, which was out of the liberty. The defendant was afterwards discharged under the Insolvent Debtors' act, and the plaintiff appointed assignee of his estate:—*Held*, that the plaintiff was thereby estopped from ruling the bailiff to return the mandate.

Semble, that the placing the defendant in the custody of the sheriff, out of the liberty, amounted to an escape in law.

THE plaintiff having obtained a rule calling on the chief bailiff of the liberty of *Langborough*, in the county of *York*, to make a return to the sheriff's mandate for taking the defendant into custody under a writ of *capias ad satisfaciendum*—

Mr. Serjeant *Wilde*, on the first day of this term, obtained a rule *nisi*, on the part of the defendant, to discharge this rule, on an affidavit which stated, that, upon the arrival of the commissioner of the Insolvent Debtor's Court at *York*, on his last *Summer Circuit*, the constable of *York Castle* certified that the defendant was in his custody at the suit of the plaintiff; that the defendant had been afterwards duly discharged under the Insolvent Debtors' Act; and that the plaintiff, who was the only creditor, had been appointed and had accepted the office of sole assignee of the defendant's estate and effects.

Mr. Serjeant *Jones* now shewed cause.—The officer of the liberty was guilty of a violation of his duty in transferring the defendant to the custody of the sheriff, and by so doing he was guilty of an escape. The county gaol is not the prison of the liberty, and the chief bailiff does not act as a bailiff of the sheriff, but by virtue of his own authority in a distinct and independent liberty, and the sheriff is not answerable for his conduct. When the Court call on the sheriff for a return of a *ca. sa.* in such a case as the present, he annexes the bailiff's return to him, which is "*quod cepit corpus prædicti J. S., cujus corpus A. B. (ballivus) coram justiciariis domini Regis ad diem et locum infra contentum paratum habebit (a);*" and here, it

(a) Return. Brev. 168, 9; Offic. Brev. 216.

was the duty of the chief bailiff to present some facts to the Court, equivalent to such a return; and if he had so done, the rule to bring in the body of the defendant must have been served upon him, and not on the sheriff. The profits arising from the execution of the writ belong to the bailiff. He is bound to keep the prison of the liberty, and he alone is responsible; and it would be unjust that he should subject the sheriff to any responsibility, by conveying the body of the prisoner to the county gaol. In *Brooke's Abridgment* (a), it is said, "that, if a person be imprisoned in execution in a county or a liberty, the gaoler cannot carry him out of the county or liberty, unless in some special case (which means by *habeas corpus*, or the like); and if he does, the prisoner may have an action of false imprisonment." But the case of *Boothman v. The Earl of Surry* (b) is precisely in point. There it was decided, that the bailiff of a liberty, who has the return and execution of writs, is liable to an action of debt for an escape, if he remove a prisoner taken in execution to the county gaol, situate out of the liberty, and there deliver him into the custody of the sheriff. Although it may be said that the plaintiff is estopped from calling on the bailiff to make a return to the sheriff's mandate, by having accepted the office of assignee of the insolvent; yet, the acceptance of that office being in the nature of a trust for the benefit of the creditors at large, it was no waiver of any previous irregularity in the proceedings, or facts which had not come to the plaintiff's knowledge before the assignment. The mere circumstance, therefore, that the plaintiff has been appointed assignee, is no answer to the rule requiring the officer to return the sheriff's mandate, to which the plaintiff is clearly entitled.

1831.

HEPWORTH
v.
SANDERSON.

(a) Tit. "Escape," pl. 44.

(b) 2 Term Rep. 5.

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 HEPWORTH
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 SANDERSON.

Mr. Serjeant *Wilde*, in support of his rule, was stopped by the Court.

Lord Chief Justice TINDAL.—The plaintiff in this action has obtained the ordinary rule, calling on the bailiff of a liberty to return the sheriff's mandate for taking the defendant into custody, under a writ of *cepias ad satisfaciendum*. A rule has been since obtained, on the application of the bailiff, to discharge the rule requiring him to make a return to the mandate, and, under the circumstances, I think that this latter rule should be made absolute. There are many cases in which a plaintiff is not in a condition to call upon the sheriff for the return of a writ, as, where he has taken an assignment of the bail bond, or where he has specially appointed his own bailiff. So, if after an arrest, the plaintiff and defendant meet, and the plaintiff agrees to accept a certain sum in discharge of his debt and of all claims upon the defendant, he cannot call on the sheriff to return the writ. Again, if the party arrested become bankrupt, and the plaintiff in the action consents to be his assignee, he cannot sue the sheriff for not returning the writ in the original action, and thereby seek to recover a separate compensation from him. The merits are precisely the same in this case, for the plaintiff, after he had caused the defendant to be taken in execution at his suit, became the assignee of all his estate and effects, under the insolvent debtors' act. By so doing, he expressed himself to be content; and he is thereby estopped from going into the question of escape, which, at all events, is only an escape in law, and not in fact. The defendant was in the custody of the sheriff, after which, the plaintiff became a party to the deed of assignment, which would not have been executed, unless the defendant had been in custody and discharged; and the plaintiff, by consenting to become his assignee, has admitted

that the custody was an existing and legal custody; and as he has not discharged himself from his office of assignee, but still continues to act as such, he ought not to call upon the bailiff of the liberty to make a return to the sheriff's mandate to him.

1831.
HERWORTH
v.
SANDERSON.

Mr. Justice GASHELE.—I am of the same opinion. The plaintiff took an assignment of all the defendant's estate and effects, after his discharge under the insolvent act. That appears to me to be decisive of the question. We must presume that the plaintiff knew in what custody the defendant was when he took the assignment, as that fact must necessarily have appeared in his petition; and when he discovered that the defendant was in improper custody, he should have applied to the insolvent debtors' Court to be relieved from his office of assignee; but, as he still continues to act as such, he cannot call on the bailiff to return the sheriff's mandate to him.

Mr. Justice BOSWORTH and Mr. Justice ALDERSON concurring—

The rule for discharging the rule for the return of the mandate, was made—

Absolute.

1831.

Monday,
Nov 14th.

One who is discharged under the insolvent debtors' act 7 Geo. 4, c. 57, is not exonerated from the claim of a surety on a promissory note, which became due before the insolvent presented his petition, but which the surety was not called on by the creditor to pay until after the discharge of the principal.

POWELL v. EASON.

THIS was an action of *assumpsit* for money paid by the plaintiff to the defendant's use.

At the trial, before Lord Chief Justice *Tindal*, at the last Assizes at *Lincoln*, certain admissions were given in evidence, by which it appeared, that, on the 1st *April*, 1829, the defendant purchased the good-will of a shop and stock in trade of one *Mary Bell*, and that, to secure the payment of the sum agreed on for such purchase, the plaintiff, as surety for the defendant, signed with him a joint and several promissory note for the amount, payable to *Mrs. Bell* at six months after date, and which note accordingly became due on the 4th *October*, 1829; that, on the 12th *November* following, the defendant was arrested at the suit of a creditor, and rendered to the *King's Bench* prison on the 17th; that, on the 21st, he presented a petition to the insolvent debtors' Court, filed his schedule on the 9th *December*, and obtained his discharge on the 1st *February*, 1830; that the defendant had inserted the plaintiff's name as a creditor, and the amount of his debt, in the schedule, and also the amount of the promissory note given to *Mrs. Bell*; and that she having called on the plaintiff for payment, he, on the 22nd *December*, 1830, paid her the amount of the note, together with interest from the day it became payable. The Jury found a verdict for the plaintiff for the sum so paid.

Mr. Serjeant *Adams*, on a former day in this term, obtained a rule *nisi* that this verdict might be set aside and a nonsuit entered, pursuant to leave given by his Lordship at the trial; it being there objected, that, the discharge of the defendant under the insolvent debtors' act, 7 Geo. 4, c. 57, was an answer to the plaintiff's demand, and a good defence to this action.—The learned Serjeant referred to the 40th, 46th, 48th, 49th, 51st, 60th, and 64th

sections of the statute, and submitted, that, by virtue of the 51st and 60th clauses, the defendant was discharged from his liability on the note in question; and that the plaintiff, as his surety, could not enforce his claim in respect thereof, as the note had become due and payable before the defendant was arrested or taken into custody.

1831.

POWELL
v.
EASON.

Mr. Serjeant *Wilde* now shewed cause.—The only question is, whether, the defendant having been discharged under the insolvent debtors' act, 7 Geo. 4, c. 57, he is exonerated from the claim of the plaintiff as his surety on a promissory note which became due before the defendant had petitioned the Insolvent Court for his discharge; but which the plaintiff was not called upon to pay until after the discharge. The 10th section of the statute provides that a prisoner applying to the Insolvent Court by petition, must, by such petition, pray to be discharged from custody, and to have future liberty of his person against the demands for which he shall be then in custody, and against the demands of all other persons who shall be, or claim to be, creditors of such prisoner *at the time of presenting such petition*; and, by the 48th section, the Court or commissioners may direct the prisoner to be discharged from custody, on his swearing to the truth of his petition and schedule, as to the several debts and sums due or claimed to be due *at the time of filing such prisoner's petition*; and here, the amount of the note in question was described in the defendant's schedule as being due to *Mary Bell*, and the plaintiff was a mere surety for its payment, and could not be considered as a creditor of the defendant until he had paid her; and he was not required to do so until after the defendant's discharge.

Mr. Serjeant *Adams* and Mr. Serjeant *Heath*, in support of the rule.—The general object and intention of the

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v.
EASON,

legislature in passing the statute in question, was, to give a party imprisoned for debt a complete discharge from all the existing demands of his creditors; and the Court will so construe the act as to give it the fullest possible effect in favour of the debtor. The note in question was due and payable before the defendant was arrested and imprisoned, and the plaintiff, as his surety, was liable, and might have been called on to pay the amount the day after the note became due. The debt, therefore, did not arise after the defendant's discharge; it was in fact in existence long before. By the act, the insolvent is required to give up the whole of his property for the benefit of his creditors; and the 64th section enacts that no person who shall have been discharged by virtue of the act, shall be entitled to the benefit of it within the space of five years after his discharge, unless it shall be made appear to the satisfaction of the insolvent debtors' Court, or of a commissioner, &c., before whom such person shall be brought for the hearing of the matters of his petition, that he has, since his former discharge, endeavoured, by industry and frugality, to pay all just demands upon him; and that the debts which such person has incurred subsequent to such discharge have been necessarily incurred for the maintenance of such person or his family, &c." If, therefore, this action can be maintained, the defendant may be deprived of the benefit of the act for the space of five years; but a surety is not to be in a better situation than any other creditor. By the 60th section it is enacted, "that no person who shall have become entitled to the benefit of the act, shall at any time thereafter be imprisoned for or by reason of any debt or sum of money with respect to which such person shall have become so entitled; and the words "*sum of money*" are far more extensive than that of "*debt*," and are applicable to such a demand as the present. So, by the 61st section, the discharge of the insol-

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and to extend to any sum which shall be payable by way of annuity or otherwise, in or out of the Court, in any case where the Court shall refer to the case of *Frederick v. Binger* (a), where it was held that the grantor of an annuity discharged under the statute 1 Geo. 4, c. 118, is liable to be arrested by his surety for arrears which become due subsequently to his discharge, and which the surety was obliged to pay, or no bill was need given in such case is dischargeable, in the statute 1 Geo. 4 had not been passed. Besides, an annuity creditor stands in a wholly different situation from a surety; and, if all the clauses of the last act are taken together, it is quite clear that the Legislature meant that the debtor should be discharged from all demands or debts due to his creditors, previously to, and at the time of, his discharge. The defendant, therefore, was exonerated from the plaintiff's demand, and the object of the statute would be altogether defeated, if the debtor, after being discharged from the claims of his principal creditors, should be deemed liable to be sued by the surety of one of such creditors.

Lord Chief Justice TINDAL. It appears to me that the plaintiff was entitled to a verdict, and that it ought to stand. The question arises on the construction of the insolvent debtors act, 1 Geo. 4, c. 57, and we must look at the description of the debts from which the insolvent is to be discharged, by the tenth and forty-sixth sections of the act. The tenth authorizes the prisoner to petition the insolvent debtors Court to be discharged from custody, and to have future liberty of his person against the demands for which the prisoner shall be then in custody; and against the demands of all other persons who shall be or claim to be creditors of such prisoner at the time of presenting such petition. And the 46th section enacts "that it shall be lawful for the Court to adjudge

(a) 1 Moore & Payne, 91; 3 C. 4 Bing. 416.

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the prisoner to be discharged from custody as to the several debts and sums of money due, or claimed to be due at the time of filing such prisoner's petition. Was, then, the plaintiff a creditor of the defendant at the time of presenting or filing his petition? The plaintiff was then only a surety for the payment of a promissory note due from the defendant to *Mary Bell*. There was no debt as between the plaintiff and the defendant, and consequently the plaintiff was not a creditor of the defendant at the time of his discharge, and therefore he does not fall within the words or meaning of either of those clauses of the act. In confirmation of this view of the subject, we find, that, in the last act for the amendment of the laws relating to bankrupts (a), which was passed in the year preceding that in which the statute in question was passed, it was found necessary to introduce a clause to relieve bankrupts from the claims of sureties and other persons who were liable for the bankrupt's debts; and by the 52nd section, it is enacted, "that any person who, at the issuing of the commission, shall be surety or liable for any debt of the bankrupt, if he shall have paid the debt, or any part thereof in discharge of the whole debt, if the creditor shall have proved his debt under the commission, shall be entitled to stand in the place of such creditor as to the dividends and all other rights under the commission which such creditor possessed or would be entitled to in respect of such proof; or, if the creditor shall not have proved under the commission, such surety shall be entitled to prove his demand in respect of such payment as a debt under the commission, not disturbing the former dividends, and may receive dividends with the other creditors accordingly." But there is no such auxiliary clause in the act now before us, from which we may infer that the legislature did not intend a surety for a bankrupt to stand in the same situation as a surety for a person who became insolvent,

(a) 5 Geo. 4, c. 16.

or that the same relief should be granted to the latter as to the former.

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Mr. Justice GASELER.—I am of the same opinion. There is no possibility for a surety to come in and claim under the insolvent debtors' act, except by paying the debt before the discharge of the insolvent; and in this case no debt was then due.

Mr. Justice BOSANQUET.—I am also of opinion that the plaintiff is entitled to retain his verdict. The debt for which he sued became due subsequently to the discharge of the defendant; and there are no words in the act to relieve the insolvent from such a claim as the present; or to shew that the debt had been discharged. The relief is confined to debts due to creditors at the time of filing the petition. As to the 51st section, which enacts that the discharge of the prisoner may extend to any sum which shall be payable by way of annuity or otherwise, at any future time or times, by virtue of any bond, covenant, or other securities of any nature whatsoever; it is impossible that these words can include a debt like the present; they are applicable to a case wholly different: that section enacts that the Court shall ascertain the value of the sums payable, regard being had to *the original price* given for such sum or sums of money, deducting therefrom such diminution in the value thereof as shall have been caused by the lapse of time since the grant thereof to the time of filing such prisoner's petition. In those cases, the debts must have been created before and at the time of filing the petition; whilst here the plaintiff's demand was in the nature of a *debitum in presenti, solvendum in futuro*.

Mr. Justice ALDERSON.—The 51st section of the statute was meant to confer a benefit on annuity creditors, by empowering them to claim for the whole amount at first, instead of the mere arrears due at the time of the filing

1892.

FOURTH
a.
BASON.

the position; and, for the reasons stated by my brother *Bosanquet*, it is quite clear that that clause does not apply to the case of a surety called on to pay a debt, and was paid subsequently to the discharge of the insolvent. This rule, therefore, must be applied in this case.

Discharged.

Monday,
Nov. 14th.

In an action for a breach of warranty on the sale of a horse, the purchaser produced the following receipt, signed by the seller.
"Received of A. B. (the purchaser) 10*l*. for a grey four years old colt, warranted sound in every respect:—*Held*, that, in the absence of fraud, the warranty was restricted to the soundness of the animal, the age being mere matter of representation or description.

Budd v. Fairmaner.

THIS was an action for the alleged breach of a warranty of the defendant's colt, which he had exchanged for the plaintiff's mare (a).

The declaration stated, that, in consideration that the plaintiff would deliver to the defendant a certain mare of him the plaintiff, and also pay the defendant 10*l*., in exchange for a certain colt of the defendant, he, the defendant, undertook and faithfully promised the plaintiff, that the said colt was a four years old colt. The plaintiff then averred, that he, confiding in the defendant's promise, delivered the mare and paid the 10*l*. to the defendant; yet, that the defendant, contriving and fraudulently intending to injure the plaintiff, did not perform or regard his said promise and undertaking, but thereby craftily and subtilly deceived the plaintiff in this, to wit, that the said colt, at the time of the making of the said promise and undertaking of the defendant, was not a four years old colt, but, on the contrary thereof, was much less than a four years old colt, to wit, a three years old colt, whereby the colt became and was of no use or value to the plaintiff, and thereupon, also, the plaintiff was put to great charges

(a) See *Fairmaner v. Budd*, 5 Moore & Payne, 334, where the defendant brought an action against the plaintiff for a breach of war-

ranty of the soundness of his mare, and the Jury found a verdict for the plaintiff, which the Court refused to disturb.

and expense in feeding, keeping, and taking care of the said colt.

1831.

RECEIVED
BY
A
FAIRMAN.

At the trial, before Lord Chief Justice Tindal, at Guildhall at the adjourned sittings after the last term, the plaintiff, in order to prove the warranty of the colt, produced the following receipt, which was drawn up at a public-house, at the suggestion of the plaintiff's coachman, and to which the defendant subscribed his mark, he being unable to write his name:—

“Received, August 4, 1830, of Mr. Badd, 10*l*. for a grey four years old colt, warranted sound in every respect.”

Several veterinary surgeons were called, who stated, that, on the day of the sale of the colt, he was only three years old, and that he would not be four years old, till May, 1831.

The plaintiff also proved that he purchased the colt to match a coach horse, and several witnesses stated that he would not be fit for that purpose till he was actually four years old.

For the defendant, it was contended that there was no evidence of a warranty that the colt was four years old, as the warranty in the receipt applied only to the soundness of the animal, and not to his age, which was a matter of description; and the case of *Richardson v. Brown* (a) was cited and relied on. The Lord Chief Justice, being of opinion that the objection was well founded, directed a nonsuit.

Mr. Serjeant Wilde, on a former day in this term, obtained a rule nisi that the nonsuit might be set aside, and a new trial had, on the ground that, in law, the warranty by the defendant included the age as well as the sound-

(a) 8 A. B. Moore, 338; 5 C. 1 Bing. 344.

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 BUDD
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ness of the colt.—The warranty on the face of the receipt is an express and not an implied warranty. The animal sold was described to be a four years old colt; the age was the essence of the contract, and the warranting him to be sound did not qualify the former part of the contract as to the age. Every ingredient in a written warranty, where the terms are express, must be strictly complied with; and where an article of a given description is sold, it must correspond with such description. In *Bridge v. Wain* (a), where goods sold were described in the invoice as scarlet cuttings, Lord *Ellenborough* held that a warranty must be inferred that the goods answered the known mercantile description of scarlet cuttings. In *Yeats v. Pim* (b), where a person agreed to sell a quantity of prime singed bacon, it was held that evidence was not admissible of a custom in the trade to receive bacon to a certain degree tainted, as prime singed bacon; and Lord Chief Justice *Gibbs* said—"Where a party undertakes that he will supply goods of a certain description, he must execute his engagement accordingly;" and in *Gardiner v. Gray* (c), where the defendant contracted to sell the plaintiff waste silk, and it was found to be of a quality not saleable under the denomination of *waste silk*, Lord *Ellenborough* said—"The intention of both parties must be taken to be that it shall be saleable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghil." So here, the plaintiff intended to buy a four years old horse to match another to draw his carriage; and it was proved on the trial, that a three years old colt was not fit for such a purpose.

Mr. Serjeant *Andrews* and Mr. Serjeant *Russell* now

(a) 1 Stark. Ni. Pri. Cas. 504.

Taunt. 446.

(b) 2 Marshall, 141; S. C. 6

(c) 2 Camp. 144.

shewed cause.—The nonsuit is right. The language of the receipt is decisive to shew that the defendant meant to warrant the soundness only, and not the age of the animal, which was mere matter of description. The structure of the whole of the instrument, and the position in which the word *warranted* is placed, must be looked at; and if the defendant had meant to warrant the age as well as the soundness of the colt, the words would have been, “warranted a four years old colt, and sound in every respect.” Every representation made by a seller does not amount to a warranty. The distinction is, that a warranty, as part of the contract, must be strictly complied with, whereas, a representation need only be performed in substance; and a representation made without fraud, if not false in a material point, or if it be substantially, though not literally fulfilled, does not avoid or vitiate the contract. The cases relied on for the plaintiff were not cases of express warranty, but of mere matter of contract, and there can be no doubt but that it is the duty of the vendor to deliver an article corresponding with that he professes to sell. In *Gardiner v. Gray*, the article was described in the sale note as *waste silk*, but it was ascertained to be of a quality not saleable under that denomination; and, as Lord *Ellenborough* justly said—“The purchaser had a right to expect a saleable article, answering the description in the contract.” So, in *Bridge v. Wain*, the article was described in the invoice as “scarlet cuttings,” and Lord *Ellenborough* said—“If they were sold by that name, and were so described in the invoice, an undertaking that they were such must be inferred.” There, too, the value differed according to the quality of the article, which was to be exported and sold in *China*. In *Yeats v. Pim*, the Court merely decided that an usage of trade could not be set up to contravene an express contract. Here, however, it is evident from the terms of the receipt, that the seller only meant to warrant

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the soundness of the animal sold. The case of *Richardson v. Brown* (a) is accurately to be distinguished from the present. There, a horse was described in the sale book as "a black gelding about five years old; has been constantly driven in the plough—warranted;" and the Court held that the warranty applied to the soundness of the animal, and not to the nature of his employment. So, in *Dickinson v. Shepp* (b), which was tried before Lord Chief Justice Dallas, at Guildhall, at the Sittings after Hilary Term, 1821, where the plaintiff brought an action against the defendant to recover the price of a horse, on the ground of a breach of warranty by the defendant, and produced in evidence the following receipt written by the latter:—
 "Received of Robert Dickinson 100*l.* For a bay gelding, got by Chesire Chase, warranted sound;" and the plaintiff proved that the horse was not got by Chesire Chase; his Lordship held, that the warranty was confined to the soundness of the animal, and the statement that he was got by Chesire Chase was a mere representation; and the plaintiff was nonsuited. In *Jencks v. Stile* (c) it was held, that the inserting the name of an old artist in a catalogue as the painter of a particular picture, is not such a warranty as will subject the seller to an action for, as Lord Kenyon said, "if the seller only represents what he himself believes, he can be guilty of no fraud." Although, in *Williamson v. Millaps* (d), it was held, that, in an action for a breach of warranty of goods, the seller need neither be charged nor proved, yet so was on the ground that the gist of the action was the warranty, and the slender mere matter of aggravation. Here, however, the plaintiff might have easily ascertained whether the colt were four years old or not, by inspecting his mouth. The age, therefore, was mere matter of description, and

(a) 8 J. B. Moore, 338; S. C. (c) 2 Esp. Rep. 572.

1 Bing. 344.

(d) 2 East, 446.

(b) MS. Mr. Serjt. Lawes.

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the receipt is conclusive upon the face of it to show that the warranty applied only to the soundness of the animal; and in *Dunlop v. Hoag* (a), where the vendor, not knowing the age of a horse, but having a written pedigree which he received, sold him as a horse of the age mentioned in the pedigree, and at the same time stated that he knew nothing of him but what he had learnt from the pedigree—it was held that he was not liable to an action, although the pedigree was proved to be false.

Mr. Sergeant *Wilde* and Mr. Sergeant *Spencer* in support of the rule.—By the terms of the receipt, the defendant warranted a grey four years old colt, it is bound in every respect. (The instrument upon the face of it applied to the age as well as the soundness of the animal; and if he had described it as a gelding or mare, it would clearly have been a breach of the warranty.) If it had not answered that description, the colt was purchased by the plaintiff as such a horse, and it was proved that he would not be fit for that purpose till he had reached the age of four years. So, if the defendant had warranted him to be a running horse, he could not be sued as to the till he had been properly trained. (The cases of *Gordian v. Gudge*, and *Briggs v. Hais* are probably in point to show that this article delivered under a description with the description of it given by the vendor at the time of the contract for sale.) Now precision of definite words is necessary; and therefore it is to be inferred that the warranty is to be restricted to the latter part of the contract, namely, the soundness of the colt. Lord Coleridge says (b) If a man make a covenant by deed, and in the deed doth warrant the land against A, S. and his heirs, it doth is a general warranty during the life of the feoffee; and, if a man make a lease for life, reserving a rent,

(a) Peake's Nl. Pri. Cas., 3rd edit. 167.

(b) Co. Litt. 384. a.

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and add an express warranty, the express warranty doth not take away the warranty in law, for he hath election to vouch by force of either of them." So, if a man sell a horse as a perfect horse, warranted sound, the entirety of the animal forms the most material part of the contract; and if he should turn out to be a gelding, it would be a breach of the warranty: and here, the animal was expressly described as a four years old colt. That was not a mere representation, but a distinct reference to the age as well as to the soundness of the colt, and amounted to a general warranty of both, and was so intended. The case of *Shepherd v. Kain*(a) is in point. There, the vendor of a ship described her in an advertisement for sale, as a copper fastened vessel, to be taken with all faults, without any allowance for any defects whatsoever; and, as it appeared that she was only partially copper fastened, it was held, that, notwithstanding the words "with all faults," &c., the vendor was liable for the breach of the warranty: and the Court said—"With all faults, must mean with all faults which it may have consistently with its being the thing described." The case of *Richardson v. Brown* is distinguishable, as there the vendor sought to recover the price of a horse which the buyer had accepted and retained; and the objection that the seller was not entitled to recover, as he had not shewn that the horse had been constantly driven in the plough, was raised for the purpose of eluding payment. Here, if there had been no warranty as to the soundness, it is quite clear that the plaintiff was entitled to have a four years old colt; and he meant to protect himself against all latent defects. In *Grey v. Cox* (a), Lord Chief Justice Abbott said, "that, if a person sold a commodity for a particular purpose, he must be understood to warrant it reasonably fit and proper for such purpose;" and here, the defendant described the colt as being four years

(a) 5 Barn. & Ald. 240.

(b) 4 Barn. & Cress. 115; S. C. 6 Dow. & Ryl. 200.

old; and he was unfit for the purpose for which the plaintiff required him if he had not attained that age.

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Lord Chief Justice TINDAL.—In this case a written instrument was produced by the plaintiff at the trial, to shew the nature of the contract between him and the defendant. It was in the form of a receipt, and drawn up after the termination of the bargain as to the terms on which the horses were to be exchanged. Now, we must interpret the instrument by what appears on the face of it to have been the intention of the parties at the time it was given. The words are—"Received of Mr. *Budd* (the plaintiff) 10*l.*, for a grey four years old colt, warranted sound in every respect." I should say that the parties meant to confine the warranty to the soundness of the colt, and that the preceding statement as to his age was mere matter of description. And the difference is most essential as far as regards the damages, in case the plaintiff should have been deemed entitled to recover for the breach of the warranty as to the age as well as to the soundness of the animal. Whatever a party warrants he is bound to make good to the letter of the warranty, whether the quality warranted be material or not: it is only necessary for the purchaser to shew that the article sold is not according to the warranty. Here, the colt might have been honestly described as to his age, and the plaintiff did not attempt to attribute fraud in that respect to the defendant, who might have believed the animal to have been four years old. In *Parkinson v. Lee* (a), upon a sale of hops by the sample, with a warranty that the bulk answered the sample, it was held that the law did not raise an implied warranty that the commodity should be merchantable, although a fair merchantable price were given; and therefore, that, if there were a latent defect existing in the

(a) 2 East, 314.

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article at the time of the sale, unknown to the seller, and without fraud on his part (but arising from the fraud of the grower from whom he purchased), the seller was not answerable, although the hops turned out to be unmerchantable; and Mr. Justice *Grove* said—"If an express warranty be given, the seller will be liable for any latent defect, according to the old law concerning warranties. But if there be no such warranty, and the seller sell the thing such as he believes it to be, without fraud, I do not know that the law will imply that he sold it on any other terms than what passed in fact." And Mr. Justice *Lewin* said—"I know of no authority which makes the seller liable for a latent defect, where there is no fraud, and no representation was made by him on the subject, to induce the buyer to take the thing." A party who makes a simple representation as to the description of the article sold, stands in a very different situation from a person who gives a warranty, because, in the former case, if the buyer discover a latent defect, he must allege and prove that the description was false within the knowledge of the seller; whereas, in the latter case, it is only necessary for him to shew that the article sold is not according to the warranty. This distinction might have been in the mind of the defendant when he signed the receipt in question. There is a great deal of doubt and nicety as to the meaning of the words "four years old colt," viz. whether, when the animal was rising four, or when it had completed its fourth year. But, when the defendant sold a grey four years old colt, warranted sound in every respect, it appears to me that he meant to say that he would be responsible for the soundness only, and that the age of the animal was mere matter of description, and for which he is not to be answerable, unless the plaintiff shewed that the defendant's representation as to the age was false within his own knowledge. Many cases have been referred to in the course of the argument; and we have been

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carried back to the time of Lord Coke, as to the interpretation to be put on the word *dedi*; but his Lordship was then treating of the statute *De bigamis*, and the effect of the word *dedi* when contained in a grant or feoffment by deed. It seems to me, therefore, that it cannot apply to this case. But, in the more modern practice of conveying, words of that description have been brought within a more narrow limit; for, in *Browning v. Wright*, Lord Chief Justice Ebbes said (a)—“The words ‘granted, bargained, sold, enfeoffed, and confirmed,’ certainly import a covenant in law, the effect and meaning of which would be affected by the subsequent words of the indenture.” In *Shepherd v. Klein* (b), there was no express warranty, but, as the vessel was described as being copper fastened, and was only partially so, the vendor was held liable for a breach of warranty. So, as the Court said, “the ship was not a copper fastened ship at all.” In all the other cases to which we have been referred on behalf of the plaintiff, the sellers had delivered articles essentially different from those which they had professed to sell. But the cases of *Richardson v. Brown* and *Dickenson v. Gapp* appear to me to be precisely in point, and in favour of the defendant.

Mr. Justice GASELLE.—My Lord Chief Justice has gone so fully into the question, that it is only necessary for me to say that I perfectly coincide with him, and think that every person of ordinary understanding must see that the defendant meant to limit the warranty to the soundness of the cork.

Mr. Justice BOSANQUET.—In every case where the contract appears upon the face of a written instrument, we must endeavour to collect from it the intention of the

(a) 2 Bos. & Pal. 21.

(b) 5 Barn. & Ald. 240.

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parties at the time the contract was entered into. If the defendant meant to warrant his colt to be four years old, he would be bound to comply with his warranty; as, where the dealing is by a contract note, the particular article therein described must agree with the terms of the note. So, a warranty written in the margin of a policy of assurance is considered equally binding, and subject to the same rule of construction as if inserted in the body of the policy; and if there be no express stipulation that the ship shall be seaworthy, yet that is holden to be implied. Here, however, the instrument is not a contract note of the seller, but a mere receipt, descriptive of an antecedent contract; and we are not to infer from the terms used, or wording of the instrument, that the defendant had warranted the colt to be four years old. From the position in which the word *warranted* is placed, it appears to me to be obvious that the parties meant to confine it to the soundness of the animal, as the sentence ends with the words, "warranted sound in every respect," after describing the colour and age of the animal sold. The case of *Richardson v. Brown* was decided on that principle, and the Court drew the distinction, and said, that, as the word *warranted* concluded the sentence, and followed those which were descriptive of the work to which the horse had been accustomed, it was more natural to infer that the warranty applied rather to the soundness of the animal than the nature of his employment; but that, if the word *warranted* had preceded those of "constantly driven in the plough," it might have made a very material alteration in the construction of the sentence. The case of *Dickenson v. Gapp*, appears to me to be precisely in point; and, from the terms of this receipt, I think the defendant only meant to warrant the soundness of the colt, which he had previously described to be four years old.

Mr. Justice ALDERSON.—It is not necessary for me to

say whether the case of *Richardson v. Brown* was well decided or not, because we can collect from the collocation of the word *warranted*, that the parties meant to confine it to the soundness of the colt, and not to extend it to the whole or preceding part of the sentence, which was merely descriptive of the animal sold, and for which the defendant acknowledged he had received 10*l.* from the plaintiff.

Rule discharged.

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CORBETT and Others v. JAMES BROWN.

Tuesday,
Nov. 15*th*.

THIS was an action on the case, and brought against the defendant for a false representation which he had made to the plaintiffs as to the solvency of his son, *Henry Brown*. The declaration stated, that the plaintiffs, before and at the time of the committing the grievances by the defendant as thereafter mentioned, had been and still were warehousemen, and the trade and business of warehousemen for and during all that time and still did use, exercise, and carry on, to wit, at *London*; that, the plaintiffs so being warehousemen, and so using, exercising, and carrying on the said trade and business, one *Henry Brown*, before the committing of the grievance by the defendant thereafter next mentioned, to wit, on the 16*th* April, 1830, at *London*, applied to the plaintiffs, and stated that he was about to commence business at *Norwich*, and that he had about 300*l.* capital, his own property, to commence business with, and requested the plaintiffs to sell goods to him in the way of their trade and business of warehousemen, and referred the plaintiffs to the defendant to corroborate the statement of him the

The defendant's son having purchased goods from the plaintiffs on credit, they wrote to the defendant, requesting to know whether his son had, as he stated, 300*l.* capital, his own property, to commence business with; to which the defendant replied, that his son's statement as to the 300*l.* was perfectly correct, as the defendant had advanced him the money. It was proved, that, at the time of the advance, the defendant had taken a promissory note from his son for 300*l.*, payable on demand, with interest, which interest was paid. Six

months after the communication to the plaintiffs, the defendant's son became bankrupt:—*Held*, that it was properly left to the jury to say whether the representation made by the defendant was false within his own knowledge; and, the jury having found a verdict for him, the Court granted a new trial.

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said *Henry Brown*, that he had 300*l.* capital, his own property, to commence business with at *Norwich*; whereof the defendant, afterwards, and before the sale of the goods by the plaintiffs to the said *Henry Brown*, thereafter next mentioned, to wit, on &c., had notice, and was requested by the plaintiffs to inform them if the said *Henry Brown* had 300*l.* capital, his own property, to commence business with at *Norwich*: nevertheless, the defendant, well knowing the premises, and that *Henry Brown* had not 300*l.* capital, his own property, to commence business with at *Norwich*, but fraudulently intending craftily and subtilly to deceive and injure the plaintiffs in that behalf, to wit, on &c., falsely, fraudulently, and deceitfully informed the plaintiffs, in answer to their said inquiry, that the statement so made to them by the said *Henry Brown* as to the 300*l.* was perfectly correct, as the defendant had advanced him, *Henry Brown*, the money: by means, and in consequence of which information so given by the defendant to the plaintiffs, they, not knowing to the contrary, but believing therefrom that the said *Henry Brown* had 300*l.* capital, his own property, to commence business with at *Norwich*, afterwards, to wit, on &c., and on divers other days and times, were induced to give credit to the said *Henry Brown*, and did then and there sell and deliver to him divers goods on credit, at or for divers prices, in the whole amounting to 700*l.*; whereas, in truth and in fact, the said *Henry Brown*, at the time of the defendant so giving the information to the plaintiffs as aforesaid, had not 300*l.* capital, his own property, to commence business with at *Norwich*, and the defendant, at the time of his so giving the said information to the plaintiffs, well knew the same; and whereas, in truth and in fact, the defendant, at the time of his so giving the said information to the plaintiffs, had not advanced the said sum of 300*l.*, or any sum whatsoever, to the said *Henry Brown*; and that he, the said *Henry Brown* now is, and then was, in bad

and insolvent circumstances; and that the said sum of 700*l.* is wholly due and unpaid to the plaintiffs, and that they are likely to lose the same.

The defendant pleaded the general issue.

At the trial, before Lord Chief Justice *Tindal*, at *Guildhall*, at the Sittings after the last term, the plaintiffs, in order to prove the allegations in the declaration, produced a letter written by them to the defendant, which was as follows:—

“*London, April 16, 1830.*

“Sir—Your son, Mr. *Henry Brown*, has purchased goods of us, and referred us to you, in order to corroborate his statement of having 300*l.* capital, his own property, to commence business with at *Norwich*. We require to know if such be the case. Any information you may please to give will oblige us, and which we shall be happy to apply in promoting your son's object, provided we can consistently do so. We shall be glad of an answer by return of post, and are, &c. &c.

“*Corbett, Symes, & Co.*”

On the 17th *April*, the defendant sent the plaintiffs the following letter in answer:—

“Gentlemen—In reply to your letter of yesterday, I beg to acquaint you, that the statement made to you by my son *Henry*, as to the 300*l.*, is perfectly correct, as I advanced him the money, being the utmost I could spare at the present time, in consequence of having a numerous family. I hope my son's dealings with you will be at all times as correct as the present statement, I am, &c. &c.

“*James Brown.*”

The plaintiffs then proved, that, after the receipt of this letter, they supplied goods to the defendant's son, *Henry Brown*, at different times, to the amount of 700*l.*, and that

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on the 30th October, 1830, a commission of bankrupt was sued out against him, under which the plaintiffs received a dividend of 8s. 8d. in the pound.

It also appeared, by a letter from the defendant to his son, dated on the 26th March, being about three weeks before his letter to the plaintiffs, that the defendant, on advancing the 300*l.* to his son, *Henry Brown*, had required and obtained his promissory note for the amount, payable on demand, with interest at five per cent., and which interest was paid up to a short time before the bankruptcy; but the plaintiffs offered no evidence to shew that the defendant had proved the amount of the note under the commission.

His Lordship left it to the jury to say whether the representation made by the defendant to the plaintiffs, by his letter of the 17th April, was false within his own knowledge; and his Lordship remarked that the letter, upon the face of it, seemed to import a gift of 300*l.* from the defendant to his son. The jury, however, found a verdict for the defendant.

Mr. Serjeant *Wilde*, on a former day in this term, obtained a rule nisi that this verdict might be set aside, and a new trial granted, on the ground that the finding of the jury was contrary to the evidence, and which was apparent by the defendant's own letter; for, the plaintiffs having requested to know whether his son had 300*l.* capital, his own property, the defendant stated that he had advanced him that sum, whereas, in fact, he had taken a security for it, and had advanced it by way of loan only, and not absolutely, or as a gift; and if the plaintiffs had been made acquainted with the real circumstances of the advance, it is quite clear they would not have furnished the defendant's son with goods to the amount they did.

Mr. Serjeant *Jones* now shewed cause.—The question

in this case was properly left to the Jury, and was in terms similar to that submitted to them in *Dobson v. Charles* (a); namely, whether the communication made by the defendant to the plaintiffs was false within his own knowledge: and when that case came a second time before the Court, Lord Chief Justice Tindal said (b)—“The jury, in finding that the defendant had no intention to defraud, meant only that he was not actuated by the baser motive of obtaining an advantage for himself, but that he was guilty of fraud in law by stating that which he knew to be false, and which was the cause of loss to the plaintiff. The question, therefore, is, whether, if a party makes representations which he knows to be false, and occasions injury thereby, he is not liable for the consequences of his falsehood.” There, however, the jury expressly found that what the defendant had done constituted a fraud in the legal acceptance of the terms, whilst here they have negatived fraud altogether, by finding a verdict generally for the defendant; and, in order to support this action, the plaintiffs should have shewn that the representation made to them by the defendant was fraudulent and untrue within his own knowledge, and that it had caused an injury to the plaintiffs. Now, it is quite clear that the sum of 300*l.* had been advanced by the defendant to his son; he therefore was fully warranted in returning the answer he did to the plaintiffs’ inquiry. An advance of money by a father to a son must be considered as in the nature of a gift, and not as a loan to a stranger; and when the son obtained it, he alone had the control over it, and might apply it as he pleased, and the defendant had no power over it afterwards. Besides, it appeared that the defendant did not come in as a creditor and prove the amount of the note as a debt under the commission. The

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(a) 6 Bing. 401; S. C. 4 Moore & Payne, 61.

(b) 7 Bing. 107; S. C. 4 Moore & Payne, 746.

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jury, therefore, were fully warranted in finding a verdict for the defendant, particularly as the plaintiffs obtained a dividend of 8s. 8d. in the pound, and the defendant could only be liable to the extent of 300*l.*, as the plaintiffs' inquiry was limited to that sum.

Mr. Serjeant *Wilde*, in support of his rule, was stopped by the Court.

Lord Chief Justice TINDAL.—As the ground of the motion to set aside the verdict for the defendant was that it was contrary to evidence, I think there ought to be a new trial, on payment of costs. I shall therefore merely observe that I think the jury have drawn a wrong conclusion from the correspondence between the plaintiffs and the defendant; and that the latter of the latter appears to me to be capable of bearing but one construction, for he stated that he had advanced his son 300*l.* as his own property, which is in express contradiction to a loan. I hope, however, the parties will come to some terms without incurring the expense of another trial.

Mr. Justice GASBLEE.—In all probability the plaintiffs would not have supplied the defendant's son with goods if they had not believed that the sum of 300*l.* had been actually advanced to him by his father, especially as they inquired whether it was his own property, and the defendant said that the statement made by his son was perfectly correct.

Mr. Justice BOSANQUET.—A person who sets up in business on borrowed capital is in a very different position from a party who has money of his own, and is unembarrassed with debt; for, the party who borrows his whole capital, is in fact in a state of insolvency at the time.

Mr. Justice ANDERSON:—It was properly left to the jury to consider whether the representation made by the defendant was false within his own knowledge; and by the letters which passed between him and the plaintiff, I own I am not satisfied with the verdict. The rule for a new trial must, therefore, be made—

Absolute, on payment of costs (a).

(a) Upon the second trial, the jury again found for the defendant; and, upon a motion for a third trial, the Court said, that, after two juries had come to the same conclusion upon a mere question of fact, they could not send the cause down again.

The Mayor, Sheriffs, Citizens, and Commonalty of the City of Norwich v. GILL and two Others.

Mr. Serjeant *Taddy* applied for a rule nisi to refer it to the Prothonotary to elect and approve of two persons as elisors, to whom process might be directed between the above parties. The learned Serjeant stated that the sheriffs of *Norwich* were members of the corporation; that the coroners formed part of the commonalty; and that the mayor and corporation were about to sue out mesne process against the defendants. He therefore prayed that the Court would enjoin the Prothonotary to name and appoint elisors, to whom the writ might be directed.

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Where the sheriffs and coroners are members of a corporate body who sue in such character, the Court will direct the Prothonotary to name and appoint elisors to whom the process may be directed; and the rule is absolute in the first instance.

The Court acceded to the application, and ordered the rule to be made absolute in the first instance.

Rule absolute (a).

(a) The writ was issued in the usual way, but directed to "A. B. and C. D., elisors duly elected," instead of to the sheriffs, and the words "in your bailiwick" altered to "in our city of *Norwich*, and county of the same city."

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The Court would not allow the *venue* to be changed from *London* to the city of *Norwich* on the usual affidavit: it is necessary for the defendant to state some special ground for the application.

SCRUTTON v. DAWSON.

MR. Serjeant *Jones*, on behalf of the defendant, moved to change the *venue* in this cause from *London* to the city of *Norwich*, on the usual affidavit, unless the plaintiff would consent to go to trial at the next Assizes for the county of *Norfolk*.

But the Court held that the affidavit was not sufficient, and that it was incumbent on the defendant to shew some special ground for the application.

The learned Serjeant, therefore, took nothing by his motion.

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The landlord, in case of an execution against his tenant, is entitled to a full year's rent, although he had, on former occasions, voluntarily deducted a portion of such rent.

WILLIAMS v. LEWSEY.

AN execution having been sued out by the plaintiff against the defendant's goods, the sheriff, after the levy, and before the sale, received a notice from the defendant's landlord to retain and pay over to him 450*l.*, the amount of a year's rent. The sheriff, under an indemnity from the plaintiff, refused to retain more than 360*l.* on the ground that the landlord had abated the defendant's rent to that sum.

Mr. Serjeant *Wilde*, on behalf of the landlord, on a former day in this term, obtained a rule calling upon the sheriff to shew cause why he should not pay over the above sum of 450*l.* out of the proceeds of the sale of the defendant's goods. The application was founded on an affidavit of the landlord, which stated, that, although on former oc-

casions he had voluntarily deducted 20*l.* *per cent.* from the defendant's rent, yet that it was a mere temporary gratuity, and that he might call upon the defendant for the full amount of the rent whenever he thought fit, and that he expressed on his half yearly receipts that he had received 180*l.* in satisfaction of that portion of the yearly rent of 450*l.*

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Mr. Serjeant *Andrews* was now about to shew cause—

But the Court held, that, as the landlord had made a voluntary deduction to favour the tenant, it did not follow that he was bound to make a like abatement to his creditors, and consequently that he was entitled to the full amount of the yearly rent.

Rule absolute.

SARAH BRIDGES, Widow, v. JANE SMYTH, Spinster.

SAME P. SAME.

Wednesday,
Nov. 16th.

THE plaintiff having obtained judgment against the defendant in two actions in this Court, amounting together to the sum of 818*l.* 15*s.*, and the defendant having obtained a judgment against the plaintiff in an action in the Court of King's Bench, to the amount of 3,052*l.*

The plaintiff obtained judgments against the defendant in two actions in this Court, and the defendant obtained a judgment against the plaintiff in

the Court of King's Bench:—*Held*, that the defendant, upon asking satisfaction for the amount of the judgments in this Court on the judgment she had obtained against the plaintiff in the Court of King's Bench, might enter satisfaction on the judgment-rolls in the two actions in this Court, although the plaintiff had died, and more than two years had elapsed before judgment had been entered up against her in the Court of King's Bench, the verdict having been obtained in her lifetime, subject to a reference, and a rule nisi to reduce the damages awarded by the arbitrator being pending at the time of her death:—*Held*, also, that the judgment for the plaintiff in this Court might be set off against the judgment for the defendant in the Court of King's Bench, although the plaintiff's attorney had administered to her, effects, as a judgment creditor, and sued out a writ of *elegit* against the defendant, and commenced ejectments to enforce it:—*Held*, also, that the attorney had no lien for his costs upon the judgments in this Court; and, he having refused to allow them to be set off against the judgment in the King's Bench, the Court ordered him to pay the costs of this application.

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v.
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Mr. Serjeant *Wilde*, in the last term, obtained a rule calling on the plaintiff's attorney to shew cause why the defendant, upon acknowledging satisfaction for the above sum of 81*l.* 1*s.* on the judgment obtained by her against the plaintiff for 3,052*l.* in the Court of *King's Bench*, should not be at liberty to enter satisfaction upon the judgment-rolls in the above two actions in this Court, and why all further proceedings in those actions should not be stayed; and why the plaintiff's attorney should not pay to the defendant the costs of this application. The motion was founded on affidavits, which stated, that, in *Trinity Term*, 1829, the plaintiff, obtained judgment against the defendant in two actions in this Court, the one amounting to 462*l.*, for money lent and advanced, the other in replevin, for 394*l.* 1*s.*, damages and costs, the whole amounting to 81*l.* 1*s.*; that the plaintiff died in *April*, 1830, the judgments having been entered up as of the term in which they were obtained; that the defendant had obtained a verdict against the plaintiff in the Court of *King's Bench* before her death, and the amount of the damages was referred to an arbitrator, who made his award in the life-time of the plaintiff; that she afterwards obtained a rule *nisi* in the Court of *King's Bench*, to reduce the amount of the damages awarded to the defendant, but that, owing to the pressure of business in that Court, and the priority of other motions, cause was not shewn against the rule until more than two terms had elapsed after the plaintiff's death, she having died pending the rule for the reduction of the damages, as stated above.

THE CASE OF THE PLAINTIFF.

Mr. Serjeant *Storks* and Mr. Serjeant *Russell* now shewed cause; on an affidavit, which stated, that, after the plaintiff's death, her attorney, as administrator, sued out a writ of *elegit* against the defendant, and commenced several actions of ejectment in the Court of *King's Bench*, in

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order to enforce the writ. The learned Sergeant submitted first, that, under the above circumstances, the judgments obtained by the defendant against the plaintiff in the Court of King's Bench, was not valid in law, the plaintiff having died after verdict, and judgment not having been signed within two terms after her death, as it ought to have been, in pursuance of the statute 17 Car. 2. c. 8, s. 1, by which it is enacted, "that, in all actions personal, real, or mixed, the death of either party, between the verdict and the judgment, shall not be alleged for error, so as such judgment be entered within two terms after the verdict;" and, in this case, more than two terms had intervened between the time of the plaintiff's death and the day of signing judgment. Secondly, no application could have been made in the Court of King's Bench to set aside the judgment obtained against the plaintiff, until it had been revived by her personal representative; and, as her intestate administered to her effects, and issued out a writ of *legis* against the defendant, and brought her effects into execution, the execution on the plaintiff's judgments must be considered as executed. Thirdly, the judgments obtained by the plaintiff in this Court, cannot be set off in law against the judgment obtained by the defendant in the Court of King's Bench, as the plaintiff having died, and her attorney being her administrator, the judgments in this Court were, in a different right, and could not be set off without affecting the claims of the plaintiff's creditors to accept. Lastly, the plaintiff's attorney, at all events, had a lien for his costs on the judgments obtained by her in this Court, and he consequently cannot be called upon for the costs of this application.

Mrs. Sergeant Wilde and Mr. Sergeant Andrews, in support of the rule. The only question is, whether the amount of the judgments entered up for the plaintiff in this Court, can be set off against the judgment obtained

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by the defendant against the plaintiff in the Court of *King's Bench*. With respect to the *first* objection, although the verdict was obtained against the plaintiff in the Court of *King's Bench*, and the award made previously to her death; yet, as the rule to reduce the damages was pending at the time she died, the statute of *Charles* is altogether out of the question.—*Secondly*, although the administrator sued out a writ of *elegit*, and commenced actions of ejectment to enforce it, yet, as such actions were still pending, it does not amount to satisfaction, nor can the judgments in the plaintiff's actions be considered as prosecuted to execution; for, in *Peacock v. Jeffery (a)*, it was held, that the taking the person in execution does not satisfy a debt, so as to extinguish it, but that it may still become the subject matter of a set-off; and in *Simpson v. Hanley (b)*, the defendant was allowed to enter satisfaction on the roll upon a judgment obtained against him in the Court of *King's Bench*, upon his acknowledging satisfaction for the amount upon a judgment obtained by him in this Court against the plaintiff, for a larger amount, although he had the plaintiff in custody in execution upon that judgment.—*Thirdly*, although it has been said that the judgments obtained by the plaintiff in this Court, cannot be set off against the judgment obtained by the defendant in the Court of *King's Bench*, as they are in different rights, and that the interests of the plaintiff's creditors intervene, yet, in *Barker v. Braham (c)*, it was decided that a judgment in the Court of *King's Bench* may be set off against a judgment in this Court, so as to narrow the execution to the balance due. That case is stronger than the present; for, there, a certain sum being due to the defendant from the plaintiff, as administratrix, on a judgment recovered by the defendant in the *King's Bench*, the

(a) 1 Taunt. 426.

(b) 1 Mau. & Selw. 696.

(c) 2 Sir W. Bl. 869; S. C. 3 Wils. 396.

plaintiff, in her right as administratrix, brought an action against the defendant in this Court, for a debt due to the intestate, and obtained a verdict and judgment, and the Court allowed the amount of the judgment in the *King's Bench* to be deducted from the judgment in this Court, and ordered, that, on payment of the balance due to the plaintiff, with costs, the execution should be stayed.—*Lastly*, as to the *lien* of the plaintiff's attorney for the costs upon the judgments obtained by her in this Court—the case of *Lomas v. Mellor* (a) is precisely in point to shew, that, in this Court, the general rule is, that the costs of one action may be set off against those of another, without regard to the attorney's *lien*, which is subject to the equitable claims existing between the parties in the cause.

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Lord Chief Justice TINDAL.—This was an application by Miss *Smyth*, the defendant in two actions brought against her by the plaintiff in this Court, calling upon the attorney of the latter to shew cause why the defendant, upon acknowledging satisfaction for 816*l.* 15*s.* on a judgment for 3,052*l.* in the Court of *King's Bench*, should not be at liberty to enter satisfaction on the two judgment-rolls in this Court; and why the plaintiff's attorney, who had administered to her effects, should not pay the costs of this application. After looking at the affidavits, and hearing the arguments in support of and against the rule, I am of opinion that it ought to be made absolute. The facts appear to be these:—In *Trinity* Term, 1829, the plaintiff, Mrs. *Bridges*, obtained judgment against the defendant, Miss *Smyth*, in two actions in this Court, the one for money lent, amounting to 422*l.*, the other in replevin, in which the plaintiff recovered 394*l.* 15*s.*, both sums amounting to 816*l.* 15*s.* The plaintiff died in April, 1830, after the two judgments had been entered up

(a) 5 J. B. Moore, 95.

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in this Court, but two terms before judgment had been entered up against her by the defendant in the action brought by the latter in the Court of *King's Bench*. It further appears that the plaintiff's attorney, administered to her effects, claiming to do so as a judgment-creditor to the amount of 500*l.* on a *cognovit* given to him by the plaintiff, his client. The first question then is, whether, under these circumstances, the judgments entered up in this Court for the plaintiff, Mrs. *Bridges*, are properly the subject of set-off against the judgment obtained by the defendant against the plaintiff in the Court of *King's Bench*. Three objections have been urged against the set-off, and although it has not been insisted that a judgment obtained in this Court in a suit between the same parties cannot be set off against a judgment obtained by one of such parties in the Court of *King's Bench*, yet it is said that that rule cannot apply to this case, as the judgment in the Court of *King's Bench*, if not altogether void, is at least irregular, because it was not signed within two terms after the death of the plaintiff, Mrs. *Bridges*. But it appears to me that the statute 17 *Car.* 2, c. 8, does not apply, as the verdict was obtained during the life of the plaintiff, and the amount of the damages was referred to an arbitrator, who also made his award in her life-time. But an application was made by her to the Court of *King's Bench* to reduce the amount of the damages awarded, and the rule was pending during the time necessary for deciding other causes which had priority; and before cause could be shewn the plaintiff died. This case, therefore, is not governed by the terms of the statute 17 *Car.* 2, but rests on the rule established by the common law, that, where a party is entitled to judgment, and the cause is not decided, but delayed by the act of the Court, such party does not lose his right, nor are his representatives to suffer by his death in the mean time; for, eventually, judgment is entered *nunc pro tunc*, as if he

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were still alive: and here, although the judgment was entered up in *Trinity* Term, 1829, yet, as it was suffered to exist by the adverse party on the rolls of the Court, without any application to set it aside, we can only treat it as a valid and existing judgment: and if any application were made it should have been to the Court of *King's Bench*, who had power to amend the proceedings, in order to obviate the alleged irregularity. But it has been objected secondly, that the plaintiff's attorney, as her administrator, has advanced a step further than the defendant, and got the advantage in his own hands, as he has prosecuted the judgment to execution; and therefore that he is not in the same situation as the adverse party, and ought not now to be stopped. But the answer is, that he has obtained no real satisfaction; on the contrary, he has only caused a writ of *elegit* to be sued out, and commenced actions of ejectment, which are still pending in the Court of *King's Bench*; and the endeavouring to obtain satisfaction is no answer to an application of this description, unless complete satisfaction has been obtained; for, in *Simpson v. Handley*, the defendant was allowed to enter satisfaction on the roll upon a judgment obtained against him in the Court of *King's Bench*, on his acknowledging satisfaction for the amount upon a judgment obtained by him in this Court against the plaintiff for a larger amount, although he had the plaintiff in custody in execution on that judgment. The third objection is, that this is not a case between two parties representing each other in his own right, as the plaintiff on the one side and the defendant on the other; for that, the plaintiff in one of the suits being dead, and administration being taken out to her estate and effects, the rights of creditors intervene, and the disposition of assets is thereby altered. But the objection turns on a fallacy; for, what are the assets as between the plaintiff and defendant? If this were the case of a simple contract debt instead of a judgment, and the plaintiff owed the defendant

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50*l.*, and the latter was indebted to the former in 40*l.*, the amount of the assets would be 10*l.*, that being the balance of account between them. So, if the sums were secured by bond, there would be no difficulty whatever, and the mere circumstance that the debts are secured by judgments makes no difference, for the actual balance forms the assets; and, in the case of *Barker v. Braham*, which was decided in 1773, a judgment in the Court of *King's Bench* was directed to be set off against a judgment in this Court, and the balance due to the plaintiff to be paid by the defendant, that being all that the creditors could claim. On the equitable principle, therefore, as well as on the rule of law that has so long and universally obtained, I am of opinion that the set-off of the judgments in this Court against that in the Court of *King's Bench* ought to be allowed. It has been said that the plaintiff's attorney had a *lien* for his costs upon the judgments in this Court, and that he would be deprived of such costs if the set-off were permitted; but it is well known that in this Court the attorney's *lien* is not regarded, as it has been held to be subject to the equitable claims that exist between the parties in the cause; and, although the practice of the Court of *King's Bench* differs in this respect, as that Court will not allow the debt and costs in one action to be set off against those in another, until the attorney's bill of costs is discharged, yet we must adhere to our own rules. Without, therefore, going into the merits of this case, or considering the conduct of the plaintiff's attorney, yet, as he was an officer of the Court, and bound to know the practice, and was applied to by the defendant to allow the set-off, but refused to do so, I think he ought to pay the costs of this application; and the Prothonotary, on looking at the affidavits, which are extremely long, will make such deductions as the justice of the case may require.

Mr. Justice GASELER.—I fully agree with my Lord

Chief Justice as to the terms on which this rule should be made absolute. I never had any doubt as to the defendant's right to set off the judgments in this Court against that in the Court of *King's Bench*, or as to the *lien* of the plaintiff's attorney for his costs. The only difficulty I felt was, whether, as the plaintiff had died, and her attorney had taken out letters of administration, as a judgment-creditor, the judgments in the one Court could be set off against that in the other. But that difficulty is removed by the case of *Barker v. Braham*; and, although I still entertain some doubt as to the costs of the application, it is not sufficiently strong to induce me to differ from the rest of the Court, particularly as the plaintiff's attorney refused to allow the set-off on an application by the defendant for that purpose. We cannot, upon these affidavits, inquire into alleged defects in the judgment in the Court of *King's Bench*, which must be considered as an existing judgment, as there is no irregularity apparent upon the face of it, and no application has been made to set it aside.

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Mr. Justice BOSANQUET.—All the objections that have been raised in this case have been so fully discussed and answered by my Lord Chief Justice, that it is not necessary for me to express any opinion further than that I entirely concur with him; and, with respect to the costs of this application, I think they should be paid by the plaintiff's attorney, because, being an officer of the Court, he ought to know the practice in such a case, and should not have compelled the defendant to make this application, particularly as he was previously requested to allow the set-off.

Mr. Justice ALDERSON concurred.

Rule absolute.

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Thursday,
Nov. 17th.

To take a case out of the statute of limitations, the plaintiff produced a deed whereby the defendant had assigned to the plaintiff and one C. the whole of his property, in trust to secure 6s. 8d. in the pound to his creditors, in which deed was a recital that the defendant was indebted to the plaintiff and the other creditors whose names were thereunder written in the several sums set opposite their respective names in a schedule annexed to the deed. The deed also contained a proviso that "the deed and all the covenants therein" should be void, unless all the creditors signed by a given day. The deed was not executed by all the creditors; neither was the plaintiff's name or the amount of his debt inserted in the schedule; nor did he execute the deed:—*Held*, that this was not a sufficient acknowledgment to take the case out of the statute; and that the amount of the plaintiff's debt could not be supplied by parol evidence, or by the admission of counsel at the trial.

KENNETT v. MILBANK.

THIS was an action of *assumpsit* upon a promissory note for 144l. 6s., and interest, drawn by the defendant, on the 22nd January, 1822, payable to the plaintiff, or order, three months after date. The defendant pleaded the general issue, and the statute of limitations.

At the trial before Mr. Justice *Gaselee*, at the last Assizes for the county of *Essex*, in order to take the case out of the statute, the plaintiff offered in evidence a deed bearing date the 16th March, 1829, and made between the defendant of the first part, the plaintiff and one *Cooper* of the second part, and divers creditors of the defendant, whose names were thereunder written, of the third part, whereby, after reciting that the defendant was indebted to the plaintiff and the others in the several sums of money set opposite to their respective names in a schedule annexed to the deed, the defendant assigned to the plaintiff and *Cooper* a freehold estate and other property, in trust to sell the same, and to pay the proceeds to such of the defendant's creditors as should sign their names to the schedule, if the defendant should have omitted to pay them 6s. 8d. in the pound by the 20th December then next; with a proviso, that, if all the creditors whose debts amounted to 10l. did not sign the deed by the 13th August then next, the deed and all the covenants therein should be void. The deed was not executed by the plaintiff; neither did all the defendant's creditors whose debts amounted to 10l. sign the deed by the stipulated time; nor was the amount of the plaintiff's debt inserted in the schedule.

On the part of the defendant it was contended that the recital in the deed was not a sufficient acknowledgment of the debt to take the case out of the statute of limitations: but it was admitted by the defendant's counsel that the debt sought to be recovered in this action was the debt alluded to in the deed. A verdict was taken for the plaintiff, for the amount of the note and interest; and leave was reserved to the defendant to move to set it aside and enter a nonsuit.

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Mr. Serjeant *Andrews*, in the last term, accordingly obtained a rule *nisi*, against which—

Mr. Serjeant *Wilde* now shewed cause.—The deed in question contained a sufficient acknowledgment of the fact of the defendant being indebted to the plaintiff, and the admission made at the trial shewed that the debt due on the promissory note was that pointed at by the deed. All that is required by the statute 9 *Geo.* 4, c. 14, is an acknowledgment in writing: and here is an acknowledgment under the hand and seal of the defendant. That statute, after reciting that questions had arisen as to the effect of acknowledgments and promises to revive debts barred by the statute of limitations, enacts, “that, in actions of debt, or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby.” Before that act, a parol admission was sufficient to revive the debt—*Gibbons v. M^cCasland* (a), *Mountstephen v. Brook* (b),

(a) 1 Barn. & Ald. 690.

(b) 3 Barn. & Ald. 141.

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Tanner v. Smart (a), *Haydon v. Williams* (b)—the statute has merely superadded the necessity for such acknowledgment to be in writing; leaving the law in every other respect precisely as it was before.

Lord Chief Justice TINDAL.—It appears to me that the rule that has been obtained for entering a nonsuit in this case must be made absolute. The question is, whether the debt for the recovery of which this action is brought, was taken out of the operation of the statute of limitations by the evidence given at the trial. But for the late act, 9 Geo. 4, c. 14, possibly the plaintiff might have succeeded. By that statute it is enacted, "that, in actions of debt, or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments [the statute of limitations], or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby." The question, therefore, is, whether there has been any evidence in this case of an acknowledgment or promise sufficient to take the debt out of the statute. There was no evidence of any promise to pay. The only evidence was a deed between the defendant of the first part, the plaintiff and one *Cooper* of the second part, and divers of the defendant's creditors of the third part, by which, after reciting that the defendant was indebted to the plaintiff and others in the several sums of money set opposite to their names in a schedule annexed to the deed, the defendant assigned to the plaintiff and *Cooper* a freehold estate and other property, in trust to sell the same, and to pay the proceeds to such of the defendant's creditors as should sign their names to

(a) 6 Barn. & Cress. 603. (b) 7 Bing. 163; S. C. 4 Moore & Payne, 811.

the schedule, if the defendant should have omitted to pay them 6s. 8d. in the pound by a given day; with a proviso, that, if all the creditors whose debts amounted to 10*l.* did not sign the deed by a certain time, the deed and all covenants therein should be void. Here is no promise to pay the original debt. Is it then an acknowledgment within the words and meaning of the statute 9 *Geo.* 4, c. 14? The deed clearly contains no acknowledgment of the debt for which the plaintiff sues; it only applies to debts due to those creditors whose names are mentioned in the schedule, and the plaintiff's name no where appears in that schedule, neither does it appear that he ever came in as a creditor under the deed. An acknowledgment must go to the amount of the debt.

It has been contended that this deficiency in the acknowledgment has been supplied by an admission by counsel at the trial, that the debt now claimed by the plaintiff was the only debt due to him from the defendant. But we cannot couple an admission made in Court with an acknowledgment out of Court. The only use of an admission is, to dispense with proof of certain transactions, in order to save the time of the Court. Suppose, before the statute 9 *Geo.* 4, c. 14, a party sued as the acceptor of a bill of exchange, and the statute of limitations pleaded, would an admission by counsel of his hand-writing to the bill take the case out of the statute? It clearly would not. Why then should an admission have such an effect since the 9 *Geo.* 4, c. 14, which requires the whole acknowledgment to be in writing? I think this is one of the cases in which the statute meant to extend protection to parties against stale demands.

Mr. Justice GASELEE.—I am of the same opinion. The deed states that the defendant was indebted to the plaintiff and others in the several sums of money set opposite to their names in a schedule annexed thereto: but no sum

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is set opposite to the plaintiff's name in the schedule. There is, therefore, no evidence of an acknowledgment in writing. Besides, another difficulty presents itself—as to the time at which the supposed acknowledgment was made. It has been held that an acknowledgment made before the lapse of the six years, is evidence from which a promise to pay may be inferred. But here, the six years had elapsed before the deed was executed; there should therefore have been an express promise to pay. The promise, however, if any, was a mere qualified promise to pay 6s. 8d. in the pound, provided all the creditors of the defendant whose debts amounted to 10*l.* should sign the deed within a certain time.

Mr. Justice BOSANQUET.—I am also of opinion that the rule for a nonsuit should be made absolute. The statute 9 *Geo.* 4, c. 14, requires the whole acknowledgment or promise to be in writing. The acknowledgment in this case was in general terms, that the defendant was indebted to the plaintiff and others in the several sums of money set opposite to their names in the schedule annexed to the deed; this, therefore, was no sufficient acknowledgment of a debt being due to the plaintiff, without the additional evidence in writing of the sum set opposite to his name in the schedule. That evidence was wanting.

There is, however, another ground that prevents the effect of the acknowledgment in this case. An acknowledgment only operates as evidence from which a promise to pay may be inferred; and, if it be coupled with circumstances to shew that it was only intended to operate conditionally, it will not suffice to take the debt out of the statute of limitations. The deed states that the defendant is indebted to the plaintiff. That is a general acknowledgment. The proviso is, that, unless all the creditors whose debts amounted to 10*l.* signed the deed by a given time, the deed and all the covenants therein should be

void. The acknowledgment is part of the deed, and therefore cannot be held to operate against the defendant, unless the condition required to give it validity be performed by the creditors.

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Mr. Justice ALDERSON.—I am of the same opinion. To take a case out of the statute, there must be an express acknowledgment in writing of the debt for which the action is brought. Here, there was only a general acknowledgment of a debt; leaving the amount to be ascertained by parol evidence. To allow this, would lead to all the inconveniences of conflicting testimony which the late statute was intended to put an end to.

Rule absolute.

DOE v. WHITCOMB.

Saturday,
Nov. 19th.

THIS was an action of trespass for mesne profits. The cause was tried before Mr. Justice Alderson, at the last Assizes for the county of Somerset. The evidence was as follows:—

The lessor of the plaintiff recovered judgment in an action of ejectment against one P. Before execution, the defendant came into possession of the premises under P., and occupied for a year, paying rent:—
Held, that the judgment in the ejectment was evidence against the defendant in trespass for the mesne profits.

In Hilary Term, 1823, the lessor of the plaintiff obtained judgment in an ejectment brought against Simon Payne and wife, upon a demise for twenty-one years commencing in 1822. No proceedings were taken upon that judgment until Trinity Term, 1830, when it was revived by a *scire facias* (to which the defendant was a party), and a writ of possession sued out and executed. The defendant was let into possession under a written agreement entered into with the son of Simon Payne, on behalf of his father, and had occupied from November, 1829, to November, 1830, and paid rent to Payne the younger.

It was contended on the part of the defendant, that the

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judgment and execution in the action of ejectment against *Payne* and wife, were not evidence against the defendant in this action, he not being shewn to have been party or privy thereto.

The learned Judge thought, that, as the defendant came in under *Simon Payne*, he was sufficiently connected with him in privy to render the judgment in ejectment evidence in this action; and he thereupon directed a verdict to be entered for the plaintiff, reserving to the defendant leave to move to set it aside and enter a nonsuit.

Mr. Serjeant *Stephen* accordingly, on a former day, obtained a rule *nisi*.

Mr. Serjeant *Wilde* now shewed cause.—The defendant came in as tenant to *Payne* during the continuance of the term recovered in the action of ejectment; and therefore there was sufficient privy between them to render the judgment against the latter evidence against the former in this action. *Payne* was a trespasser. The defendant, claiming under him, could have no better title than *Payne* had.

Mr. Serjeant *Stephen*, in support of his rule.—The judgment in the action of ejectment against *Payne* and wife was not evidence against the defendant in this action, as he was no party to the record in that suit. The rule is, that a judgment recovered in a former suit is only evidence as between parties to the suit, or those in privy with them. *Outram v. Morewood* (a). Lord *Coke* says (b) privies are of two kinds only—privies in estate, and privies by act of law in the *post*. The action of ejectment against *Payne* supposes him a trespasser; and this ac-

(a) 3 East, 346.

(b) Co. Litt. 352. a.

tion supposes the defendant a trespasser; but they are not therefore privies.

[Lord Chief Justice *Tindal*.—The defendant cannot deny the title of *Payne* the elder, under whom he took.]

It is not necessary for the defendant to make title under *Payne*: the plaintiff must recover upon the strength of his own title. In *Denn v. White* (a), it was held that a recovery in ejectment against the wife could not be given in evidence in an action against the husband and wife for mesne profits—because the husband was no party to the record. That case is in principle precisely applicable to the present.

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Lord Chief Justice TINDAL.—The Court entertain no doubt in this case. The evidence given was—a judgment in a former action of ejectment against *Payne* and wife, the execution of a writ of possession upon that judgment, and that the defendant took the premises under *Payne*, and held for one year, paying rent. The objection is, that the verdict in the action of ejectment was not evidence against the present defendant, inasmuch as he was a stranger to that record. But the defendant came in under *Payne* whilst the judgment existed, and consequently took subject to all the liabilities of *Payne*. There was a sufficient privity in estate between them; and therefore the judgment was evidence.

Rule discharged.

(a) 7 Term Rep. 112.

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The sheriff sold goods under a *fiери facias* after a secret act of bankruptcy committed by the debtor, and, after notice of the act of bankruptcy, paid over the proceeds to the execution-creditor, under an indemnity:—*Held*, that the assignee might recover the amount from the sheriff in an action for money had and received.

YOUNG, Assignee of YOUNG, a Bankrupt, v. MARSHALL and POLAND, Sheriff of MIDDLESEX.

THIS was an action of *assumpsit* for money had and received, brought by the plaintiff, as assignee of one *Charles Young*, a bankrupt, to recover from the defendants, sheriff of *Middlesex*, the proceeds of goods belonging to the bankrupt, sold under a writ of *fiери facias*, at the suit of one *Overton*, delivered to the sheriff after an act of bankruptcy by *Young*, the bankrupt (of which act of bankruptcy the sheriff had no notice until after the levy), and which proceeds were afterwards paid over to the execution-creditor by the defendants, under an indemnity.

The writ of *fiери facias* was returnable on the 11th *January*, 1831, the *venditioni exponas* on the 29th; the sale was on the 1st *February*, and the commission against *Charles Young* issued on the 5th. The proceeds of the sale were paid over to the execution-creditor on the 10th *February*. The act of bankruptcy proved was within the first week of *January*. The commission against *Young* was not gazetted until after the 10th *February*.

On the part of the defendant, it was objected that the action for money had and received would not lie, but that trover was the proper form of action: and the cases of *Notley v. Buck* (a), and *Morland v. Pellatt* (b) were cited. For the plaintiff *Price v. Helyar* (c) was relied on to shew that the property in goods taken in execution by the sheriff after an act of bankruptcy committed by the party against whom such execution is sued out, is not changed by sale.

The jury having returned a verdict for the plaintiff—

(a) 8 Barn. & Cress. 160; S. C. 2 Man. & Ryl. 68.

(b) 8 Barn. & Cress. 722.

(c) 1 Moore & Payne, 541; S. C. 4 Bing. 597.

Mr. Serjeant *Taddy*, on a former day in this term, obtained a rule nisi that this verdict might be set aside and a new trial had, on the ground of objection urged at the trial.

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Mr. Serjeant *Wilde* now shewed cause.—The sheriff who pays over money under an indemnity, stands in the same situation as the party from whom he receives the indemnity.

Mr. Serjeant *Taddy* was called upon by the Court to support his rule.—The action for money had and received will not lie against the sheriff after he has paid over the proceeds of the sale to the execution-creditor, without previous notice of an act of bankruptcy having been committed by the debtor; for, by the sale, the property is wholly changed from the debtor to the vendee of the sheriff, and the money, the produce of the goods, then becomes the property of the creditor; for which he may maintain an action for money had and received, and for which the sheriff is responsible to him, the original debtor being then wholly and finally discharged. *Perkinson v. Gifford (a)*, *Clerk v. Withers (b)*. In *Morland v. Pellatt*, judgment was entered up on a warrant of attorney given by two joint-traders, on which a *fieri facias* issued, returnable on the 2nd of May. On the 1st of that month the sheriff's officer received from the defendants the money directed to be levied. On the 2nd May, one of them committed an act of bankruptcy, and the other on the 5th. On the 11th a commission of bankrupt issued, and on the 19th the sheriff paid over the money to the execution-creditor. In an action by the assignees, it was held that he was entitled to retain it: and, Mr. Justice *Bayley*

(a) Cro. Car. 539.

6 Mod. 290; 1 Salk. 322; Holt,

(b) *Ld. Raym.* 1075; 4 Mod. 35; 303, 646.

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 }
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said (a)—“ After seizure, and before sale, the sheriff has a special property in the goods, but the debtor has the general property: up to that time, therefore, the debt is not extinguished, and the judgment-creditor has a security for his debt. But, after sale, or payment of the money, the sheriff becomes the debtor, and the original debt is extinguished.” In *Thurston v. Mills* (b), goods were taken in execution by the sheriff under a *fieri facias*, and, whilst remaining unsold, an extent at the suit of the Crown (of a subsequent *teste*) issued, under which the sheriff took them, subject to the former seizure, and afterwards sold them under a *venditioni exponas* from the Court of *Exchequer*. Money had and received was brought by the plaintiff in the original action against the sheriff, for the proceeds of the sale. Lord *Ellenborough*, in delivering his judgment, observes—“ Neither the money nor the goods were originally, or at the time of the action brought, the property of the plaintiff. The sheriff had indeed *seized* them under a *fieri facias*; but the plaintiff acquired no property in them by the sheriff’s seizure. If they had been burnt in the hands of the sheriff, the plaintiff would not have borne the loss.” That case is a direct authority to shew that money had and received will not lie against the sheriff. The action must be in *tort*, thereby disaffirming the whole proceeding of the sheriff. The plaintiff cannot adopt the acts of the sheriff in part, and in part repudiate them. He cannot therefore affirm the sale, and then claim the proceeds. In *Smith v. Hodson* (c) it was held, that, if a bankrupt on the eve of his bankruptcy, fraudulently deliver goods to one of his creditors, the assignees may disaffirm the contract and recover the value of the goods in *trover*; but that, if they bring *assumpsit*, they affirm the contract, and then the creditor

(a) 8 Barn. & Cress. 726. (b) 16 East, 254. (c) 4 Term Rep. 211.

may set off a debt due to him from the bankrupt. Besides, the sheriff is a public officer, acting under the authority of the Court: he is therefore entitled to protection.

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v.

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Lord Chief Justice TINDAL.—I am of opinion that the verdict for the plaintiff in this case may be supported upon principles generally known and acknowledged in *Westminster-Hall*. This action is brought by the plaintiff, as assignee of a bankrupt, for money had and received by the sheriff to the plaintiff's use—the sheriff having proceeded to a sale of the goods of the bankrupt under a writ of *fieri facias* at the suit of a creditor, and paid over the money arising therefrom, after notice to the sheriff of an act of bankruptcy by the debtor; the goods being at that time the property of the assignee. No one can doubt but that, according to the modern practice, a party is not bound to sue in *tort*, where, by suing as on a contract, no prejudice is done to the defendant; and, in general, it is an advantage to the defendant to be sued in the latter form, because he thus gets rid of the claim for damages, and gains the opportunity of pleading a set-off, or paying money into Court. It is said, however, that the action for money had and received will not lie in this case, inasmuch as the sheriff had previously paid over the money levied to the judgment-creditor, without notice of an act of bankruptcy having been committed by the debtor. If such were the real fact, and the sheriff was only the agent of the creditor, the money would clearly not have been money remaining in the hands of the sheriff for the use of the plaintiffs. But it appears that the money was paid over by him under an indemnity; it may, therefore, be said not to have been paid over at all, for, it is held by the creditor ready to be returned to the sheriff in case the plaintiffs make out that they are entitled to it. It is clear that all the facts were in the knowledge of the parties, and that the money was parted with by the sheriff after he had reason to be-

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lieve that an act of bankruptcy had been committed. The supposition, therefore, that it was paid over without notice fails. The rule must be discharged.

Mr. Justice PARK.—I am of the same opinion. I entertained no doubt at the trial; and I did not expect this motion to be made. The fact of the indemnity being required by the sheriff was very strong presumptive evidence of his having had notice of the act of bankruptcy before he paid over the proceeds of the sale to the judgment-creditor.

Mr. Justice BOSANQUET.—I am of the same opinion. By relation to the act of bankruptcy, the property in the goods was in the plaintiff at the time of the sale; he is therefore entitled to the proceeds. By suing for the proceeds as money had and received by the sheriff to the plaintiff's use, he does not affirm his acts. He clearly has a right to waive his claim for damages for the injury incurred by the sale, and to sue for the price of the goods. By refusing to pay over the money arising from the sale to the execution-creditor without an indemnity, the sheriff admits his claim to be doubtful.

Mr. Justice ALDERSON.—If the fact had been that the sheriff had seized and sold the goods of the bankrupt and *bond fide* paid over the proceeds to the execution-creditor without notice of the act of bankruptcy, a different question would have arisen. But we are not now called upon to offer any opinion upon such a state of facts; for, the sheriff in this case has acted under an indemnity, which leaves the money virtually in his possession. As between the vendor and vendee, the property in the goods was clearly changed by the sale by the sheriff: but the goods belonged to the plaintiff as assignee at the time of sale.

Rule discharged.

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Cook, Assignee of CLIFF, a Bankrupt, v. JOHNSON.

Saturday,
Nov. 19th.

MR. Serjeant *Wilde*, on a former day in this term, obtained a rule *nisi* to set aside the notice of declaration and all subsequent proceedings in the cause, on the ground of irregularity, with costs. The irregularity complained of was, that the notice was of a declaration in an action *on the case*, whilst the declaration, which was filed conditionally, was in *debt*.

The notice of declaration (whether the declaration be filed absolutely or conditionally) must state the nature of the action.

Notice of a declaration in *case*, where the declaration filed was in *debt*, was held to be irregular, and the proceedings were set aside.

Mr. Serjeant *Cross* now shewed cause.—The declaration was taken off the file by the defendant's attorney, and an appearance entered, and no objection made to the irregularity until four days afterwards, when the plaintiff demanded a plea. This was a waiver of the irregularity, if any. The rule of Court (a), however, does not require the nature of the action to be stated in the notice where the declaration is filed conditionally. In *Cort v. Jacques* (b), the declaration filed in the office before the defendant's appearance, was indorsed, "filed conditionally," and judgment was afterwards signed for want of a plea: the Court held it regular, though the notice served on the defendant was of a declaration generally. Here, the defendant has sustained no inconvenience by the mistake; and he should, at all events, have come earlier to take so captious an objection.

Mr. Serjeant *Wilde*, in support of the rule.—There is

(a) Reg. Gen. *Easter*, 49 Geo. 3—1 Term. 616—"In every action in which special bail shall be required, and where the declaration shall be filed conditionally, notice in writing of such declara-

tion being so filed shall be given to the defendant, his attorney or agent; and no declaration shall be considered as filed until such notice shall be so given."

(b) 8 Term Rep. 77.

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no distinction in the practice as to whether the declaration be filed absolutely or conditionally. The notice must set forth the nature of the action. *Gravis v. Wise* (a). *Tidd's Practice* (b).

Lord Chief Justice TINDAL.—The practice with regard to notices of declaration is sufficiently established. The cause of action must in all cases be expressed. This is the more necessary where the declaration is filed conditionally. In the case of *Cort v. Jacques*, the objection taken was, that there was not sufficient precision in the notice: here the nature of the action is altogether misdescribed. The delay of four days was not, I think, so great as to destroy the defendant's right to take advantage of the irregularity.

The rest of the Court concurring—

Rule absolute (c).

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| (a) 2 Wils. 84. | ground for setting aside the proceedings for irregularity. <i>Anonymous</i> , 2 Chit. Rep. 238. <i>Hetherington v. Hobson</i> , 6 Taunt. 331. |
| (b) 9th Edit. p. 457. | |
| (c) The omission of a date to the notice of declaration, is no | |

Tuesday,
 Nov. 22nd.

Sir HENRY DIGBY v. The Earl of STIRLING.

The mere fact of the defendant having on three occasions voted in the character of a Scotch peer, at elections of representative

peers of Scotland, was held sufficient to entitle him to be discharged from arrest, although it was sworn that his title had never been otherwise recognized.

A RULE nisi was obtained by Mr. Serjeant *Spankie*, on the first day of this term, that the *capias ad respondendum* upon which the defendant in this cause had been arrested, might be set aside, and the bail-bond given

thereon delivered up to be cancelled, on the ground that the defendant at the time of his arrest was a peer of *Scotland*, and as such entitled to the privilege of freedom from arrest. The affidavit upon which the motion was founded stated that the defendant had on three several occasions, *viz.* in the years 1825, 1830, and 1831, voted at the elections of *Scottish* representative peers. The process, which was upon a bill of exchange addressed to the defendant by the title of the Earl of *Stirling*, described him as *Alexander Humphrey Alexander*.

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Mr. Serjeant *Wilde* now shewed cause, on affidavits denying the validity of the defendant's claim to the title of Earl of *Stirling*, and stating that the Lord Chancellor had refused to recognize his title in a suit in the Court of *Chancery* in which he was a defendant; that his Majesty had also declined to receive him at Court in the character of Lord *Stirling*; and that, at the last election of representative peers for *Scotland*, the Duke of *Buccleugh* and Lord *Lauderdale* had protested against his vote. The learned Serjeant referred to an order of the House of Lords, which directs that no person shall vote on an election of representative peers, unless his title has been previously recognized by that House; and he submitted that the mere fact of the defendant having on two occasions voted at the election of *Scotch* peers without his right being questioned, was no evidence of his peerage.

Mr. Serjeant *Spankie*, in support of his rule, submitted that the Court could not, upon motion, enter into any discussion as to the legality of the defendant's claim of peerage; but that the mere fact of his having on two occasions without dispute exercised the only functions which, since the act of union, he could as a peer of *Scotland* exercise, was sufficient to entitle him to the relief prayed.

Lord Chief Justice TINDAL.—The course which the

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Court are disposed, under all the circumstances of this case, to pursue towards the defendant, is that which I think he is entitled to at our hands. Without presuming to offer any opinion as to the validity of the title claimed by the defendant, it is sufficient to say that we think him entitled to be discharged on filing common bail, as he has shewn that he has performed the only acts which since the union he could perform as a peer of *Scotland*. By the 22nd article of the act of union (a), it is declared that a writ shall issue under the Great Seal of the United Kingdom, directed to the privy council of *Scotland*, commanding them to cause sixteen peers, who are to sit in the House of Lords, to be summoned to parliament; and that the names of the persons so summoned and elected shall be returned by the privy council of *Scotland* into the Court from whence the said writ did issue. By the 23rd article, it is provided “ that all peers of *Scotland*, and their successors to their honours and dignities, shall, from and after the union, be peers of *Great Britain*, and have rank and precedence next and immediately after the peers of the like orders and degrees in *England* at the time of the union, and before all peers of *Great Britain* of the like orders and degrees who may be created after the union, and shall be tried as peers of *Great Britain*, and shall enjoy all privileges of peers as fully as the peers of *England* do now, or as they or any other peers of *Great Britain* may hereafter enjoy the same, except the right and privilege of sitting in the House of Lords, and the privileges depending thereon, and particularly the right of sitting upon the trials of peers.” And by a subsequent statute (b) it is enacted (s. 1)—“ That, at all times thereafter, when her Majesty, her heirs and successors, should declare her or their pleasure for summoning and holding any parliament of *Great Britain*, in order to the electing and summoning the sixteen peers of *Scotland*, a procla-

(a) 5 Anne, c. 8.

(b) 6 Anne, c. 23.

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mation should be issued under the Great Seal of *Great Britain*, commanding all the peers of *Scotland* to assemble and meet at *Edinburgh*, or in such other place in *Scotland*, and at such time, as should be appointed in the said proclamation, to elect by open election the sixteen peers to sit and vote in the House of Peers in the parliament of *Great Britain*—(s. 2.) “That every proclamation issued for the purpose aforesaid should be duly published at the market cross at *Edinburgh*, and in all the county towns of *Scotland*, five and twenty days at the least before the time thereby appointed for the meeting of the peers to proceed to such election:” and the 3rd section prescribes the oaths to be taken by such peers on the occasion. Now here, it appears that the defendant claimed to exercise the right of voting as a peer of *Scotland* by the title of Earl of *Stirling*; that, on three several occasions, he did so vote, *viz.* in the years 1825, 1830, and 1831 respectively; that, on the two former occasions, his vote was received without objection; and that, on the last, two of the peers protested against the reception of his vote, notwithstanding which it was allowed. As, therefore, the defendant has been permitted to perform certain acts appertaining to the character of a *Scotch* peer, we may hold him to be a person privileged from arrest. Reference has been made to an order of the House of Lords, which directs that no person shall vote on an election of representative peers, unless his title has been recognized by that House. We cannot, however, take notice of that order: we must look only to the act of union; we have no right to engraft the order upon it. Without offering any opinion either for or against the validity of the defendant’s claim, we think he is entitled to a certain measure of relief. The rule, therefore, may be made absolute for discharging the defendant out of custody or cancelling the bail-bond, without costs. The de-

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fendant may, if he thinks fit, plead his privilege in abatement of the writ (a).

The rest of the Court concurring—

Rule absolute accordingly.

(a) The defendant afterwards pleaded in abatement (see *Digby v. Alexander, post, Easter Term, 2 William IV. and 8 Bing. 416*); but, inasmuch as it was not positively alleged that the defendant was

Earl of Stirling at the time of suing out the writ, the plea was held ill and there was judgment of *respondeat ouster*. See also *Cantwell v. The Earl of Stirling, 8 Bing. 174, et post, Hilary Term, 2 William IV.*

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The defendant, being arrested, obtained his discharge by giving the plaintiff security for the debt. The security proving very inadequate, the plaintiff (without restoring it) again arrested the defendant for the same cause:—The Court ordered the bail-bond to be cancelled, with costs, no fraud being imputed to the defendant.

WILSON and Another v. HAMER.

MR. Serjeant *Wilde*, on the part of the defendant, on a former day in this term, obtained a rule calling on the plaintiffs to shew cause why the bail-bond given by the defendant should not be delivered up to be cancelled, on the ground that he had been, contrary to good faith, arrested a second time for the same cause of action.

The facts were these:—In *November, 1830*, the defendant was arrested at the suit of the plaintiffs for a debt of 2,000*l.* Upon that occasion the defendant was discharged out of custody upon giving the plaintiffs security for the debt and costs. The security (an assignment of a mortgage) was afterwards found to be worth considerably less than was represented; its utmost value being 400*l.* On a reference to the Prothonotary, it was made to appear to the satisfaction of that officer, that the defendant had been guilty of no fraud. 1,000*l.* of the debt had since been paid off; and the defendant was arrested a

second time for the balance, the plaintiffs still retaining the security.

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Mr. Serjeant *Spankie* now shewed cause.—A second arrest must be shewn to be vexatious and against good faith, to induce the Court to discharge the defendant (a). *Archerv. Champneys* (b). In *Puckford v. Maxwell* (c), the defendant, having been arrested at the suit of the plaintiff, gave him a draft for a part of the demand, promising to settle the remainder in a few days, and was thereupon let out of custody. The draft being dishonored, the plaintiff arrested him again on the same affidavit; and the Court held the second arrest regular. So, here, the security given by the defendant to purchase his discharge from the first arrest proving unavailing, the plaintiff was remitted to his original rights.

Mr. Serjeant *Wilde*, in support of his rule.—The question would have been different had the security been an absolute blank, as in the case of *Puckford v. Maxwell*; but here there was an assignment of a mortgage security available to some extent; and no fraud can be imputed to the defendant. The plaintiffs should at all events have re-conveyed the mortgaged premises to the defendant previously to the second arrest.

Lord Chief Justice TINDAL.—Under the circumstances of this case, I think the rule should be made absolute. Where a party is twice arrested for the same cause of action, it is incumbent on the plaintiff to shew a sufficient ground for the second arrest. On the affidavits it appears, that, upon the first arrest, an arrangement was en-

(a) *Anonymous*, 1 Chit. 276.

(b) 3 J. B. Moore, 607.

(c) 6 Term Rep. 52.

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tered into, and security given by the defendant to the plaintiffs. How far that security was available seems to have been a matter of doubt at the time. The plaintiffs, however, took the security, and still retain it. I therefore think that the second arrest was not warranted by justice or good faith. Where the discharge from the first arrest has been procured by fraud, no doubt, on the authority of *Puckford v. Maxwell*, the defendant might be again arrested. But this is not the case here; for, the plaintiffs still adhere to the security, and seek to make it available.

The rest of the Court concurring—

Rule absolute, with costs.



HEWITT v. PIGOTT, Esq., Sheriff of SOMERSETSHIRE.

Wednesday,
Nov. 23rd.

SAME v. Lord EGMONT.

The plaintiff sued out a *fi. fa.* against Lord E., on a judgment entered up for 2,500*l.* Lord E. having previously assigned all his effects to trustees for the benefit of his creditors, the sheriff (under an indemnity from the trustees) returned *nulla bona*. The plaintiff sued the sheriff for a false return. The sheriff obtained a verdict:—The Court refused to allow the plaintiff's judgment to be set off against the costs of the action against the sheriff.

THE plaintiff obtained judgment against the effects of Lord *Egmont*, for a sum of 2,497*l.* 8*s.* 8*d.*, and sued out a *fi. fa.* thereon, to which the sheriff returned *nulla bona*, Lord *Egmont* having, by a deed of *November*, 1824 (which was prior to plaintiff's judgment), conveyed the whole of his property to trustees for the benefit of his creditors. The plaintiff brought an action against the sheriff for a false return, and obtained a verdict at the sittings after *Trinity Term*, 1830. In the following term, that verdict was set aside by the Court, and a new trial directed, on the grounds of surprise, and that

the verdict was contrary to the evidence. Upon the second trial a verdict was found for the sheriff. The sheriff therefore was entitled to enter up the verdict for the costs of that second trial.

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Mr. Serjeant *Cross*, on a former day in this term, obtained a rule *nisi* that the plaintiff might be permitted to set off the amount of the judgment in the original action against Lord *Egmont*, against these costs—on the ground that the defendants in both actions were substantially the same, the sheriff being indemnified by Mr. *Adey*, who was one of the trustees named in the deed of *November*, 1824, and the attorney for Lord *Egmont*, as well as the attorney who conducted the defence of the action against the sheriff.

Mr. Serjeant *Wilde* and Mr. Serjeant *Jones* now shewed cause.—The Court can only look at the judgment. The parties to the two suits are not in substance the same. The action for the alleged false return was defended by the sheriff, under an indemnity from the trustees named in the deed of *November*, 1824, and not by Lord *Egmont*, who had no immediate interest in the question.

Mr. Serjeant *Cross*, in support of his rule, submitted, that, under the circumstances, the Court could not fail to perceive that the parties defending the two suits were in substance the same, and consequently that the plaintiff was entitled to claim the exercise of its equitable jurisdiction in the matter.

Lord Chief Justice TINDAL.—I think this rule must be discharged. The plaintiff has a judgment against Lord *Egmont* for a debt of 2,497*l.* 8*s.* 8*d.* Having sued out a writ of *fiery facias* upon that judgment against the effects

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of Lord *Egmont*, and delivered it to the sheriff to be executed, the latter, finding that the whole of Lord *Egmont's* property had previously been assigned to trustees for the benefit of his creditors, returned *nulla bona*. The plaintiff then brought an action against the sheriff for a false return, in which action the sheriff eventually succeeded, and is now entitled to have execution for the costs. The question is, whether these costs are to be met by a set-off of the debt and costs due to the plaintiff upon his judgment against Lord *Egmont*. Are the funds to be ultimately resorted to in the two actions substantially the same? If they were so, the plaintiff would undoubtedly not be liable to be called on to pay the costs. But it is clear upon the facts that the two funds are wholly distinct. In the one action, the sheriff represents the trustees; the other is inimical to their interests, as the plaintiff thereby seeks to obtain a priority, to the detriment of the general body of creditors. The actions cannot therefore be said to be between the same parties.

Mr. Justice GASELEE concurred.

Mr. Justice BOSANQUET.—The ground of the application entirely fails. The parties to the two suits are not substantially the same. The first action is against Lord *Egmont*, the second against the sheriff, who is indemnified by *Adey*, on the part of the trustees. Lord *Egmont* can only be interested in the surplus of the fund after payment of all his debts.

Mr. Justice ALDERSON.—I am of the same opinion. This is an application to the equitable jurisdiction of the Court, and therefore a very clear case should be made out, to induce us to interfere. To accede to the prayer of the motion would operate unjustly against the general body of the

creditors of Lord *Egmont*, as it would be giving the plaintiff an undue preference. If the estate of his lordship be solvent, the plaintiff will eventually obtain full satisfaction for his demand.

Rule discharged.

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GINGELL v. GLASSCOCK.

THIS was an action for money had and received by the defendant to the plaintiff's use, under the following circumstances:—

The plaintiff was a hay salesman, the defendant a farmer. On the 31st *January*, 1829, the defendant sent his servant to the plaintiff's with a load of hay to be sold by the plaintiff on the defendant's account. The plaintiff accordingly sold the hay to one *Sumner* for 4*l.* 4*s.*, and gave directions to the defendant's servant to carry it to *Sumner's* stable. On his way the servant was met by a man who personated *Sumner*, and prevailed upon the servant to deliver the hay to him. The plaintiff having remitted to the defendant the sum for which he had agreed to sell the hay to *Sumner*, sought by this action to recover it back. The cause was by an order of *Nisi Prius* referred to an arbitrator, who awarded in favour of the plaintiff.

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The defendant consigned to the plaintiff, a salesman, a load of hay to sell on his account. The plaintiff sold the hay to one *S.*, and remitted the price to the defendant. In the mean time the defendant's servant, who had been directed by the plaintiff to carry the hay to *S.*, was defrauded of it by a swindler:—*Held*, that the plaintiff was entitled to recover back the sum remitted.

Mr. Serjeant *Jones* now moved to set aside the award, upon affidavits that the arbitrator had refused to take into his consideration several points submitted to him, but had confined himself to the question of the delivery. The learned Serjeant submitted, that, as far as the defendant was concerned, the transit of the hay was at an end on the delivery of it to the plaintiff; and that the servant, when he took it, agreeably to the plaintiff's directions, from the

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market to *Sumner's*, had ceased to be the agent of the defendant, and had become the agent of the plaintiff.

Lord Chief Justice TINDAL.—Although the arbitrator may have stepped a little out of the way, still I think upon the whole he has done substantial justice between the parties. The plaintiff was not the purchaser of the hay; he was a mere broker, selling on commission. The man who took the hay was the defendant's agent for the purpose of delivering it to the buyer.

The rest of the Court concurring—

Rule refused.

Wednesday,
Nov. 22rd.

WALFORD v. ANTHONY, HAYCOCK, and COOKE.

In trespass against *A. B.* and *C.* for breaking and entering the plaintiff's close, the locus in quo was described in the declaration as abutting "towards the north on a close of the said defendant." The evidence was, that it abutted on a close of *A.*:—*Held*, no variance, but a mere ambiguity.

THIS was an action of trespass. The first count of the declaration stated that the defendants *Anthony, Haycock, and Cooke*, were attached to answer the plaintiff, for that the said defendants broke and entered a certain close of the plaintiff, situate and being in the parish of *Boreham*, in the county of *Essex*, abutting towards the north on a close of the said defendant, and towards the south on a close of *the said defendant*, and towards the south on *Blind Lane*. The second count was for cutting down trees; and the third, *de bonis asportatis*, for carrying away the trees so cut down.

The defendants pleaded the general issue, and also several special pleas justifying under a right of way. The plaintiff joined issue on the first plea, traversed the alleged right of way, and newly assigned *extra viam*. The defendants joined issue on the traverses to the first set of pleas, and pleaded to the new assignment—first, not guilty, and then four special pleas, setting out another right of way. The plaintiff joined issue on the first

plea to the new assignment, and traversed the right of way set up in the special pleas: whereupon issue was joined.

The cause was tried before Mr. Justice *Gaselee*, at the last Assizes for the county of *Essex*. It appearing on the evidence, that the close in the parish of *Boreham* (the *locus in quo*) abutted towards the south on a lane called *Blind Lane*, and towards the north on a close of the defendant *Anthony*, it was objected on the part of the defendants that this was a variance from the abutments set forth in the declaration, the close being there stated to abut towards the north on a close of *the said defendant*, which, it was submitted, could only have reference to the defendant *Cooke*, he being the *last-named* defendant.

The learned Judge allowed the objection, and nonsuited the plaintiff.

Mr. Serjeant *Stephen*, on a former day in this term, obtained a rule nisi that this nonsuit might be set aside and a new trial had.—He contended that there was no variance between the allegation and the proof of the abutments of the *locus in quo*, but at most a mere uncertainty or ambiguity in the description, which, if it could be taken advantage of at all, could only be so on special demurrer.

Mr. Serjeant *Jones* and Mr. Serjeant *Merewether* now shewed cause.—The allegation in question was material; the abutments should have been proved precisely as alleged: and the variance is fatal. In *Hoar v. Mill* (a), where the plaintiff declared in covenant that the defendant demised to him a wharf and *storehouses*, &c., the word in the deed being "*storehouse*"—it was held to be a fatal variance, although no breach was assigned upon the demise of the storehouse, but only upon a covenant by the defendant not to

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(a) 4 Mau. & Selw. 470.

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suffer a wharf to be erected on his estate to the injury of the said wharf, *per quod* the plaintiff was deprived of certain gains which would otherwise have arisen from wharfage dues, storeroom, &c. In the present case, as the allegation was matter of necessary description, it cannot be rejected as surplusage. The declaration would clearly have been bad on demurrer, it not being sufficiently apparent which of the defendants the word "said" was intended to indicate: at all events it is a word of reference, and can only have relation to the last antecedent, *viz.* to the defendant *Cooke*. In the case of an indictment, where two dates have been previously mentioned, a word of general reference like this would relate only to the day which last occurred. In *Morgan's* case (*a*), the indictment, which was in *Somerset*, stated that whereas *Thomas Morgan nuper de D. in com. Dorset. gen. apud W. in comitat. prædict.*, did strike and kill *Turberville*; "and the exception was, the stroke and death was at *W. in com. prædict'*; and that shall be intended *in com. Dorset*, which was last mentioned, and then the indictment *in com. Somerset* is merely void; for '*Somerset*' is not named in the body of the indictment, but in the margent. And of that opinion was the Court." In *Pollard v. Locke* (*b*), in an information upon the 5 *Eliz.* c. 9, for perjury—"that whereas *J. R.* brought trespass against the informer, and he pleaded not guilty; and the plaintiff entitled himself by a feoffment of the land; he shewed a Court-roll held before *J. Locke*, gent., which proved it was copyhold; *prædict' J. Locke falso* deposit 'that he was not steward at that time,' *ubi revera* he was then steward, whereby the verdict passed against him, &c. After verdict, it was alleged in arrest of judgment, that the declaration is insufficient, for here are two *J. Lockes* mentioned, *viz.* the defendant and *J. Locke*, steward, and so may be intended another

(a) Cro. Eliz. 101.

(b) Cro. Eliz. 267.

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man; and when it is said *prædict' J. Locke deposuit*, this shall be intended to refer to him that was last named, and not to the defendant; and every declaration ought to be certain, and shall not be taken by intendment. And for this cause it was adjudged for the defendant." In *Rex v. Gripe (a)*, it was also held that *prædictus* always refers to the last antecedent. In *Childe v. Towers (b)*, the *venue* was laid in *Warwickshire*, and the plaintiff declared that the defendant was possessed at *Norton*, in the county of *Northampton, et postea, apud Stonely in com. prædict'*, assumed, &c. The *venire facias* was awarded *de Stonely in com. War.*—and it was held a mis-trial, "for, *apud Stonely, in com. prædict.*, shall be intended in *com. North.*, which is last named, and not to *Warwick*, which is in the margin."

[Mr. Justice *Alderson*.—In *Rex v. Moor Critchell (c)*, it was determined, that, where two counties have been mentioned in the antecedent part of an order of removal, the justices making the order must state themselves to be justices of the proper county; and that it was not enough to describe themselves justices of the peace in and for *the said county*, although the proper county were named in the margin, and were also named *last* before such description of the justices. That case is an authority to shew that the word "said" does not necessarily apply to the last antecedent, where there is ambiguity.]

That was the case of an order of removal, which the Court quashed for want of jurisdiction of the removing magistrates appearing on the face of the order—holding that such orders must be clear and unambiguous.

Mr. Serjeant *Stephen*, in support of his rule.—This is not a case of variance. A variance can only arise where one fact is alleged upon the record and another given

(a) 1 Lord Raym. 261.

(b) Cro. Eliz. 311.

(c) 2 East, 66.

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in evidence. All the authorities shew that the words "said" or "aforesaid" do not of necessity apply solely and exclusively to the last antecedent. Lord Coke says (a): "If a man give lands to *A. et hæredibus de corpore suo*, the remainder to *B. in formâ prædictâ*, this is a good estate taile to *B.*, for that *in formâ prædictâ* do include the other. If a man letteth lands to *A.* for life, the remainder to *B.* in taile, the remainder to *C. in formâ prædictâ*, this remainder is void for the incertaintie. But if the remainder had beene, the remainder to *C. in eâdem formâ*, this had beene a good estate taile; for, *idem semper proximo antecedenti refertur*."—*Morgan's* case was overruled by the subsequent case of *Sherley v. Sackville* (b). There, the error assigned was, "because *Surrey* was in the margin of the declaration, and the defendant therein was named of *Dorking*, in the county of *Sussex*, and that he made the obligation at *Dorking, in comitat. prædict.*; and, upon *non est factum* pleaded, it was tried by the county of *Surrey*, and thereupon error was brought; for, *comitat. prædict.* refers to the county last named, which is the county of *Sussex*; so, a mis-trial. *Sed non allocatur*; for, it shall have relation to the county where the action is brought, and that named in the margin; for the other county mentioned was by way of recital, and therefore it shall not relate thereto." *Pollard v. Locke* and *Childe v. Towers* are not in point; the Court in those cases merely go on the ground of ambiguity on the face of the record, not on the ground of variance.

Lord Chief Justice TINDAL.—We are inclined to think that the nonsuit in this case ought to be set aside upon terms. The question is, whether there is a variance between the statement upon the record and the evidence given at the trial, or whether the allegation complained of

(a) Co. Litt. 21. b.

(b) Cro. Eliz. 465.

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is not a mere defective or ambiguous description. I am of opinion that it is not a variance, but an ambiguity only. The defendants are three in number, and, agreeably to the modern usage of pleading, they are stiled "the defendants" generally. The old course of practice was, to name each defendant separately, and in that case the present difficulty could not have arisen. The declaration, in setting out the *locus in quo*, describes it as abutting towards the north on a close of *the said defendant*—and there are three defendants before named, *viz. Anthony, Haycock, and Cooke*. This certainly raises a doubt as to which defendant was meant; and it might be good cause for special demurrer: but the word "said" is clearly not (as has been contended) to be referred exclusively to the last antecedent. It would undoubtedly have been a variance had the close been described as belonging to the "*said defendants*."

Upon the whole, I think that the nonsuit on the supposed ground of variance ought to be set aside; but, inasmuch as it appears from the notes of the learned Judge who tried the cause, that the plaintiff's counsel in some sort elected to be nonsuited, in preference to going on to try the question of right of way on the merits, I think the substantial justice of the case will be, to let the costs of the nonsuit abide the event of the next trial, the defendants being at liberty to withdraw their pleas, and suffer judgment by default as to the trespass newly assigned.

Mr. Justice GASELEE.—There is no variance unless we can read *defendant* in the plural number. It was a mere clerical error.

Mr. Justice BOSANQUET.—The "said defendant" means one of the defendants. There is certainly ambiguity on the face of the declaration: but it does not in strictness amount to a variance.

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Mr. Justice ALDERSON.—A variance is, when the record and the evidence adduced in support of it are repugnant and contradictory. Here there is only doubt and ambiguity. We cannot say to which of the three defendants “said” refers: it certainly does not necessarily apply to the last-named defendant. In *Bishop v. Grant (a)*, where, in error upon an assize of rent-seck, the plaintiff made his title, that the rent was granted to be paid yearly, at the four feasts, *viz. Christmas, the Annunciation, St. John the Baptist, and Michaelmas*, and shewed that the rent was arrear for four years at the *Annunciation* last past; for which the plaintiff, “*in crastino prædict. festi Purificationis*,” demanded the said arrears; and the error assigned was, that no feast of the *Purification* was mentioned before, so that it appeared not that the demand was after the rent was due, or before. *Foster* moved “that the word ‘*Purification*’ shall be void and surplusage, and then *prædictum festum* shall refer to the feast last mentioned:” but Mr. Justice Gawdy said—“Although the word ‘*Purification*’ be void, yet *prædict. festum* cannot refer to the last feast; for there are divers feasts mentioned, so it cannot be referred to any one certain.”

Rule absolute, on the terms proposed (b).

(a) Cro. Eliz. 324.

(b) The words “in the county aforesaid,” if several counties are mentioned before, shall in an action be taken *primâ facie* to refer to the county in the margin. *Regina v. Rhodes and Cole*, 2 Ld. Raym. 886.

On an information in *Middlesex* for subornation of perjury,

stating that *A.*, late of &c., in the county of *Surrey*, impleaded *B.*, for that whereas he was indebted to him in the parish of *St. Clement's Danes*, in the county *aforesaid*, &c., and that the cause was duly tried at the Sittings in *Middlesex*; the Court cannot take the words “in the county aforesaid” to refer to *Middlesex*. *Ibid*.

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BRADLEY v. RICARDO, Esq., Sheriff of GLOUCESTER.

Wednesday,
Nov. 23rd.

THIS was an action against the defendant, late sheriff of the county of *Gloucester*, for falsely returning *nulla bona* to a writ of *fiery facias* at the suit of the plaintiff.

At the trial, before Mr. Justice *Park*, at the last Assizes for the county of *Gloucester*, the plaintiff called the officer to produce the warrant. Upon his cross-examination he stated that the defendant in the original suit had no goods in the county, either at or since the delivery of the writ to the sheriff. The plaintiff then proposed to call other witnesses to controvert this statement, and to prove that the party had goods within the sheriff's bailiwick: but it was objected on the part of the defendant that he could not be allowed to produce evidence to disprove the statement made by his own witness, without repudiating his testimony altogether; in which case he would be unable to recover, having no other means of proving the warrant.

Where a witness, called to prove a particular fact, states on cross-examination, or otherwise, another fact militating against the party calling him, other witnesses may be called on the same side to disprove such other fact; but the whole of his testimony is not necessarily to be rejected.

The learned Judge yielded to the objection, and the plaintiff was accordingly nonsuited.

Mr. Serjeant *Wilde*, on a former day in this term, obtained a rule *nisi* that this nonsuit might be set aside, and a new trial had, on the ground that the evidence tendered had been improperly rejected.—He referred to *Buller's Nisi Prius* (a), where it is laid down, that, although a party cannot call evidence directly to discredit his own witness, yet, if the witness unexpectedly state facts against the interests of the party calling him, other witnesses may be called by the same party to disprove those facts.

Mr. Serjeant *Ludlow* now shewed cause.—In *Alexander v. Gibson* (b) it was held, that, if a witness unexpectedly

(a) *Hardwell v. Jarman*, and *Hasting's case*, Bul. Ni. Pri. 297.

(b) 2 Camp. 556.

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gives evidence against the party calling him, his evidence cannot be in part relied upon, and the rest of it disproved, though it may be *entirely* repudiated, and witnesses may be called on the same side to contradict him.

[Mr. Justice *Gaselee* referred to *Ewer v. Ambrose (a)*, where, the first witness called for the defendant disproving the fact relied on in defence, it was held that the defendant was not thereby concluded, but might prove the fact by other witnesses.]

There, as in *Lowe v. Jolliffe (b)*—where it was held that a subscribing witness to a will, who swears to the testator's insanity, may be contradicted by other evidence—the witness was one of necessity, and one that the party was bound to call: whereas here the witness was voluntarily called by the plaintiff; he was not bound to prove the warrant by the officer to whom it was directed; such proof might have been given *aliunde*. The true principle is that laid down by Lord *Ellenborough*, in the case of *Alexander v. Gibson*. His lordship says: "The party is not to set up so much of a witness's testimony as makes for him, and to reject or disprove such part as is of a contrary tendency. But, if a witness is called, and gives evidence against the party calling him, I think he may be contradicted by other witnesses on the same side, and that in this manner his evidence may be entirely repudiated." The party who produces a witness must stand or fall by the whole of his testimony: he cannot reject part and retain part.

Mr. Serjeant *Wilde*, in support of his rule, was stopped by the Court.

Lord Chief Justice TINDAL.—I am of opinion that the rule for setting aside the nonsuit in this case must be made absolute. The only reasonable object of the laws of evi-

(a) 5 Dow. & Ryl. 629; S. C. 3 Barn. & Cress. 746.

(b) 1 Sir W. Blac. 365.

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dence is, to bring the whole truth before the jury. If, however, the argument urged on the part of the defendant be allowed to prevail, that object would not be attained. A plaintiff is not to be compelled to take all the chances against him, or to be bound by every statement, mistaken or otherwise, of his own witness. Can it be said, that, if a plaintiff is obliged to call the defendant's attorney, and he makes some statement adverse to the plaintiff, the latter would be precluded from calling other witnesses to shew the true state of the case? It has been observed in argument that it would create endless difficulty in summing up the testimony of witnesses, if one part of the evidence of a particular witness is to be rejected, and other part retained. The answer to that is, that the like difficulty must arise in all cases where there is conflicting testimony: in such cases, the whole question is left for the consideration of the jury. I admit the rule to be, that a party is not at liberty to throw general discredit upon his own witness, by adducing evidence as to his general bad character: but I never heard it said, that a plaintiff is precluded from controverting any particular fact stated by the witness. It is very common for a party, when asked before the trial what evidence he can give touching the matter in issue, to refuse to state then what he knows, but to say that, when put in the witness-box, he will give his evidence. In such a case as that it would be exceedingly hard upon a plaintiff or a defendant to be concluded by any statement made by such witness. I think the general rule should not be so restricted.

Mr. Justice GASELLE.—I am of the same opinion. I think the holding of Lord *Ellenborough*, in *Alexander v. Gibson*—that, if a witness unexpectedly gives evidence against the party calling him, although his evidence cannot be in part relied upon, and the rest of it disproved, it may be entirely repudiated, and witnesses may be called on the same side to contradict him—is not warranted by

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the rules of evidence. His lordship says—"If a witness is called on the part of the plaintiff, who swears what is palpably false, it would be extremely hard if the plaintiff's case should, for that reason, be sacrificed. But I know of no rule of law by which the truth is on such an occasion to be shut out and justice is to be perverted. In *Lowe v. Jolliffe*, which turned on the validity of a will, all the attesting witnesses swore to the insanity of the testator when the will was executed; but they were contradicted by other evidence, and the will was established. The party is not to set up so much of a witness's testimony as makes for him, and to reject or disprove such part as is of a contrary tendency. But, if a witness is called, and gives evidence against the party calling him, I think he may be contradicted by other witnesses on the same side, *and that in this manner his evidence may be entirely repudiated.*" That, I think, goes too far. It seems to me that it is properly for the jury to determine whether any and what part of the testimony of the witness is to be repudiated, and what entitled to credit. The case of *Ewer v. Ambrose* is directly in point.

Mr. Justice BOSANQUET.—I am also of opinion that the nonsuit in this case ought to be set aside. The rule is, that a party who calls a witness in support of his case cannot afterwards shew that he is unworthy of credit; but, if he mis-state certain facts, or fail in proving part of the case, his evidence as to those particular facts may be controverted, or the deficiency supplied, by other witnesses. It has been contended, that, if witnesses are called to contradict any particular statement of a former witness, the evidence of such witness must be rejected altogether. I do not, however, find that any such practice has ever obtained: neither do I accede to the doctrine of Lord *Ellenborough* in *Alexander v. Gibson*; it is not consistent with the rules of evidence. A party is frequently obliged to call an adverse witness to prove facts which cannot other-

wise be established; it would be manifestly unjust in such case to hold him incapable of calling his own witnesses to contradict any hostile statement made by such witness in the course of cross-examination or otherwise, except by expunging the whole of his evidence. The common course is to leave on the Judge's notes all that is proved, and let the whole go to the jury. Counsel may animadvert on the degree of credit due to each particular statement of a witness; and the jury will be guided in a great measure by the manner of the witness in giving his testimony, and the natural bias which may appear to exist in his mind in favour of one party or the other; and they may be disposed to believe one part of his statement, and to reject other part.

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Mr. Justice ALDERSON.—I am entirely of the same opinion. The rule laid down in *Buller's Nisi Prius* is, I think, clear and well principled, viz. that, "although a party cannot call evidence directly to discredit his own witness, yet, if the witness unexpectedly state facts against the interests of the party calling him, other witnesses may be called by the same party to disprove those facts:" and I must express my dissent from the holding of Lord *Ellenborough* in the case of *Alexander v. Gibson*. His lordship was evidently mistaken; for, the case of *Lowe v. Jolliffe*, to which he refers, establishes expressly the contrary of the proposition for which it was cited by him: it was there held that a subscribing witness to a will, who swears to the testator's insanity, may be contradicted by other evidence. There, although that part of the evidence of the witness which related to the insanity of the testator was contradicted, yet the other evidence in the cause was deemed sufficient to uphold the will. It would be manifestly absurd and unjust to hold that a witness who misrepresents a fact he is called for the purpose of proving, cannot be contradicted as to that particular statement by other witnesses, without expunging his entire evidence. This inconveni-

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ence would result. Suppose a witness, called for the purpose of proving a notice to produce a written instrument, in the course of his evidence gives an imperfect statement of the contents of the instrument; the doctrine contended for on the part of the defendant would go the length of preventing the production of the instrument itself, because, if produced, and found to contradict the account given of it by the witness, the whole of his evidence must be repudiated, and therefore the proof of notice to produce the document would be wanting. The proper construction of the rule is, that a party is not to be permitted generally to vilify his own witness; because, if he were altogether unworthy of credit, he should not have been placed in the witness-box: but the whole testimony of a witness is not necessarily to be rejected for a mere misstatement of a particular fact.

Rule absolute (*a*).

(*a*) In *Starkie* on Evidence, (Vol. I. p. 147), the rule is thus laid down:—"A party cannot discredit the testimony of his own witness, or shew his incompetency; for, it would be unfair that he should have the benefit of the testimony if favourable, and be able to reject it if the contrary. Where, however, a party is under the necessity of calling a witness for the purpose of satisfying the formal proof which the law requires, he is not precluded from calling other witnesses who give contradictory testimony. And even where a witness by surprise gives evidence against the party who called him, he will not be precluded from proving his case by other witnesses; for, it would be contrary to justice that the treachery of a witness should exclude a party from establishing

the truth by the aid of other testimony."

In *Richardson v. Allan* (2 Stark. Rep. 334), the indorsee of a bill, in an action against the acceptor, having called a witness to prove the indorsement, who disproved it, Lord *Ellenborough* afterwards allowed him to call the indorser himself to prove his own indorsement. And in *Beauchamp v. Nash* (1 Dow. & Ryl., N. P. C., 3), where a witness prevaricated in the course of his examination, and swore both affirmatively and negatively, Lord Chief Justice *Abbott* refused to stop the cause, but left it to the jury to decide what credit was due to the witness. See also *Ewer v. Ambrose*, 6 Dow. & Ryl. 127; *S. C.* 4 Barn. & Cress. 25.

But see *contra*, *Madge v. Fearl Smith*, 409.

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ANDREWS v. THORNTON.

Thursday,
Nov 24th.

THIS was an action on the case for slanderous words spoken of the plaintiff as a captain of a ship. In last *Hilary* Term (after notice of trial) the defendant obtained a rule for a special jury, and the cause stood for trial on the 8th *July* last, but was not called on. The defendant having omitted to strike a special jury—

The Court refused to discharge a rule for a special jury on the mere ground of a delay in striking the special jury from *Hilary* till *Michaelmas* Term.

Mr. Serjeant *Wilde*, on a former day in this term, obtained a rule *nisi* to discharge the rule for a special jury, on the ground of the unreasonable delay.

Mr. Serjeant *Spankie* now shewed cause.—The Court will not, upon a mere suggestion that it has been obtained for the purpose of delay, discharge the rule for a special jury. *Bloxam v. Brown* (a). *Tripp v. Patmore* (b). *Thorne v. The Marquis of Londonderry* (c). In the first-mentioned case, Mr. Justice *Gibbs* says (d): “I never remember in the Court of *King’s Bench* a rule of this sort discharged, where it has been regularly obtained. The course which I remember in cases where special juries have been moved for in trifling causes, or where there has been very little to prove, has been to direct that it shall be tried by a special jury in term time.” The present case is one fit to be tried by a special jury; and the defendant is ready to go to trial at the adjourned sittings after this term, or sooner if the Court think fit.

Mr. Serjeant *Wilde*, in support of his rule.—Great abuse prevails in the practice of taking out rules for spe-

(a) 4 Taunt. 470.

(b) 4 J. B. Moore, 470.

(c) *Ante*, p. 62; S. C. 8 Bing. 26.

(d) 4 Taunt. 472.

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cial juries, which ought not to be countenanced by the Court. In the present case, the defendant, having for so long a period neglected to strike a special jury, may be said to have abandoned the rule.

Lord Chief Justice TINDAL.—It would be convenient to make a rule to prevent grievances of this sort in future. But, in the present case, I do not think the conduct of the defendant has been such as to warrant the Court to discharge the rule for a special jury, though I think enough has been shewn to induce us to disallow him the costs of this motion.

The rest of the Court concurring—

Rule discharged, without costs.

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BOWER v. JONES.

It was agreed between the plaintiff and T. that T. should sell goods on commission for the plaintiff, receiving a commission of 5l. per cent. "on all goods sold or orders executed," and that he should draw his commission monthly; the plaintiff to be responsible for bad debts:—

Held, that T.

was entitled to commission notwithstanding the sales were unproductive, although it was proved that by the custom of the trade commission was not payable upon bad debts.

THIS was an action of *assumpsit* on a guarantie. The cause was referred. The arbitrator found specially—That, on the 2nd of *January*, 1826, it was agreed between the plaintiff and one *Benjamin Tupling*, that the said *Benjamin Tupling* should become the agent for the sale of the plaintiff's manufactured goods in *London* and its vicinity, for which the plaintiff was to pay him a commission of 5l. per cent. on all goods sold or orders executed through the *London* market, the plaintiff to be responsible for all bad debts contracted in his name for the purpose of carrying on his business, and to allow the said *Benjamin Tupling*

to draw his commission monthly; he, the said *Benjamin Tupling*, at the same time, undertaking to make due remittances from time to time of monies received on account of the plaintiff, and to make up all the accounts monthly; also to give security that the amount of stock and book debts should be appropriated solely for the use of the plaintiff—That, on the 9th of *January*, 1826, the defendant duly executed a guarantie in writing to the plaintiff, in the words and figures following:—

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“In consequence of an agreement entered into the 2nd of *January*, 1826, by *Joseph Bower* (the plaintiff) to supply *Benjamin Tupling* with stock of plated goods to sell for him on commission, I hereby agree as surety to guarantee Mr. *Bower* to the amount of 200*l.* for a due return of the stock in hand, and payment of the monies received on account of the said *Joseph Bower*, agreeably to the engagement subsisting between them.” “*Samuel Jones.*”

Upon the faith of which guarantie the plaintiff employed the said *Benjamin Tupling* to sell goods for him on commission, according to the terms of the aforesaid agreement—That it was not the custom of the trade to which the plaintiff belonged to allow a commission to agents upon bad debts, but that *Benjamin Tupling* did from time to time credit himself in his account with the plaintiff with certain sums for commission on certain sales effected by the said *Benjamin Tupling* on behalf of the plaintiff, which afterwards turned out to be unproductive, through the insolvency of the purchasers, and which commission on such bad debts amounted to 14*l.* 8*s.*—That, if *Tupling* had no claim to place this 14*l.* 8*s.* to the credit side of his account with the plaintiff, there was a balance due to the plaintiff of 8*l.* 11*s.* 3*d.*, exclusive of the sum of 27*l.* 4*s.* 10*s.* paid into Court by the defendant on account of the action; and exclusive also of the further sums hereinafter mentioned—That *Tupling* transmitted from time to time, at intervals of about three months,

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returns of the amount of sales made and cash received by him on account of the plaintiff—That, in the return sheet dated the 30th *June*, 1828, there was an entry (amongst others) of certain goods there specified, amounting to 16*l.* 2*s.* 3*d.*, as having been sold by *Tupling* to himself on the 17th of *May*, 1828, which goods were subsequently paid for by *Tupling* in due course—That, in the return sheet dated the 29th of *September*, 1828, there was a similar entry of goods amounting to 38*l.* 6*s.* 3*d.* as having been in like manner sold by *Tupling* to himself on the 28th of *August*, 1828, for which he accepted a bill drawn by the plaintiff on the 9th of *October*, 1828, which bill was twice renewed, the last time on the 24th *March*, 1829, but neither the original nor either of the renewed bills was ever paid—That, in the return sheet dated the 10th of *December*, 1828, there was a similar entry of a sale of goods by *Tupling* to himself, on the 21st of *November*, 1828, amounting to 13*l.* 2*s.* 6*d.*, for which no payment was ever made—That, at the close of the year 1828, the plaintiff came to town, and personally investigated *Tupling's* accounts, but could not agree with him in balancing them—That *Tupling*, in his return sheet dated the 29th *December*, 1828, debited himself in the sum of 68*l.* 14*s.* 6*d.* for goods sold by him, *Tupling*, to himself, which he entered in one gross sum under the designation of 'sundries,' and without any particular date or dates, there having been before no entry of sales made by him without specifying the details of the articles alleged to have been sold—That, in the last return sheet furnished by *Tupling*, on the 30th of *March*, 1829, there was an entry of goods, the particulars of which were specified, as having been sold by *Tupling* to himself on the 31st *January*, 1829, amounting to 19*l.* 14*s.*, and another entry of a similar alleged sale to himself on the 20th *February*, 1829, amounting to 23*l.* 16*s.*, the particulars of which were not specified—That, for some time previously to the date of the last-mentioned return, *Tupling* was in embarrassed circumstances, and

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shortly afterwards took the benefit of the insolvent act, having previously, in pursuance of the plaintiff's directions, returned to him the remainder of the goods then in his possession unsold, amounting in value to upwards of 600*l*.—That no part of the amount of the said several alleged sales from *Tupling* to himself was ever paid or settled for, either in cash or by securities, except the two first, as before mentioned—That the plaintiff never remonstrated with *Tupling* upon his debiting himself with the said alleged sales, or any of them, nor ever expressed any objection thereto—That, considering the state of *Tupling's* circumstances at that period, and the form in which the entry of the 29th *December*, 1828, was made, the arbitrator was of opinion that that entry or alleged sale, and those of the 31st of *January*, 1829, and 20th of *February*, 1829, were expedients to which *Tupling*, deeming the former alleged sales to himself to have been sanctioned by the plaintiff, had recourse in order to enable him to meet deficiencies in his accounts with the plaintiff, and not for the purpose of reselling the goods to customers of his own for a profit, in the regular way of his trade—That the plaintiff, in a letter addressed to *Tupling* on the 19th *February*, 1829, when referring to the general state of the accounts between them, included the amount of the alleged sales to *Tupling* under the head of 'accounts owing'—That, in another letter addressed to *Tupling* on the 31st *March*, 1829, the plaintiff used the words, 'You can surely send me 20*l*. on your own account;' and a subsequent letter, dated the 7th *April*, 1829, and addressed to *Tupling* by the plaintiff, contained the following passage: 'I am sorry to hear that your health will not permit you to follow your business. Although we have been hitherto unfortunate in our business, I should have felt much pleasure in keeping up a correspondence and doing a little business with you. As for the agency business, it

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does not answer; that I need not tell you: therefore the sooner it is given up the better.'

The arbitrator then awarded and adjudged that the plaintiff was entitled to recover of and from the defendant, under and by virtue of the said guarantie, exclusive of the said sum of 27*l.* 4*s.* 10*d.* paid into Court as aforesaid, the said sum of 8*l.* 11*s.* 3*d.*, if the Court should be of opinion that the plaintiff was by law entitled to disallow, as between him and the defendant, all those sums for which credit was taken by *Tupling* as commission on sales which subsequently turned out to be unproductive, owing to the insolvency of the purchasers. And he further awarded and adjudged that the plaintiff was entitled to recover of and from the defendant, under and by virtue of the said guarantie, the said several sums of 13*l.* 2*s.* 6*d.*, 68*l.* 14*s.* 6*d.*, 19*l.* 4*s.*, and 23*l.* 16*s.*, in addition to the said sum of 8*l.* 11*s.* 3*d.*, if the Court should be of opinion that the conduct observed by the plaintiff, in reference to the said alleged sales by *Tupling* to himself, did not amount in point of law to a sanction of the said transactions, so as to discharge the defendant's liability in respect of the amount thereof; which said sums amounted altogether to 133*l.* 8*s.* 6*d.*: and he then directed that a verdict should be entered for the plaintiff for the said sum of 133*l.* 8*s.* 6*d.*, subject to the opinion of the Court: but, if the Court should be of opinion that the plaintiff could not, in point of law, disallow the said credits for commission on the bad debts as aforesaid, and by his conduct had discharged the defendant from all liability in respect of the amount of the said alleged sales to *Tupling*, in that case he directed that a verdict should be entered for the defendant.

Mr. Serjeant *Wilde*, accordingly, on a former day in this term, obtained a rule nisi to enter up the verdict for the plaintiff, pursuant to the award, for 133*l.* 8*s.* 6*d.*, or such other sum as the Court should direct.

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Mr. Serjeant Jones now shewed cause.—Under the circumstances stated by the arbitrator, the defendant is entitled to a verdict. By the terms of the agreement between the plaintiff and *Tupling*, the latter was to receive a commission upon “all goods sold or orders executed through the *London* markets”—the plaintiff agreeing to be responsible for bad debts, and to allow *Tupling* to draw his commission monthly; and the latter undertaking to make due remittances from time to time of monies received on account of the plaintiff, and to make up his accounts monthly. Upon the construction of this agreement, two questions arise—*first*, whether or not *Tupling* was entitled to charge the plaintiff with a commission upon *all* sales effected, without reference to whether the credit proved good or bad—*secondly*, whether the defendant can be charged on his guarantee for the price of goods returned by *Tupling* as sold to himself.

1. The agreement is precise in its terms, and cannot be explained by parol. Commission is to be allowed *on all goods sold*; no matter whether they be productive or not: the commission is not on “money received.” *Tupling* was not to wait for his commission until the goods were paid for: he was to draw his commission monthly. The custom of the trade cannot be permitted to control the express terms of the agreement.

2. The defendant guaranteed to the plaintiff a due return of the stock in the hands of *Tupling*, and payment of the monies received by him on account of the plaintiff. The goods returned by *Tupling* as sold to himself were not within the contract.

[Mr. Justice Alderson.—It does not appear from the award whether *Tupling* charged the plaintiff with commission on the sales made to himself, or not.]

The plaintiff expressly recognised the course of dealing adopted by *Tupling* in respect to sales made to himself. These sales were entered in the various accounts transmit-

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ted by *Tupling* to the plaintiff; and the latter, in his letter of the 31st *March*, 1829, asks *Tupling* to send him 20*l.* on his own account: that was a clear recognition of the transaction as a contract of sale. In *Bartlett v. Pentland* (a), Lord *Tenterden* says: "If the plaintiffs had by their neglect, even though that neglect had been induced by the misrepresentation of their agent, placed the defendant in a situation different from that which he might have been in if no such neglect had taken place, there might be ground for contending that, in point of justice, they, and not the defendant, ought to be losers."

Mr. Serjeant *Wilde*, in support of his rule.—The first question is, on what sales was the commission payable to *Tupling*. The plaintiff agreed to pay him a commission of 5*l. per cent.* on all goods sold or orders executed through the *London* markets. It was of course intended that the parties should deal according to the known usage and custom of the trade. With regard to the second point, the plaintiff does not claim to be entitled to recover the three first sums mentioned in the award as the price of goods sold by *Tupling* to himself; but only the three last-mentioned entries, which the arbitrator finds were expedients to which *Tupling* had recourse, in order to enable him to meet deficiencies in his accounts with the plaintiff, and not for the purpose of re-selling the goods to customers of his own for a profit, in the regular way of his trade.

Lord Chief Justice TINDAL.—Upon the construction of the agreement in question, it appears to me that the plaintiff was to allow *Tupling* a commission upon all sales effected, except those alleged to have been made by *Tupling* to himself. I think, however, that all that the plaintiff can be allowed to recover is, the amount of the three

(a) 10 Barn. & Cress. 770.

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items of 68*l.* 14*s.* 6*d.*, 19*l.* 14*s.*, and 23*l.* 16*s.*, deducting the 14*l.* 8*s.*, the commission on bad debts.

Mr. Justice GABELEE.—I am of the same opinion. *Tupling* was entitled to commission upon all sales, whether productive or unproductive, without regard to any custom of trade. The verdict must be entered for the amount stated by my Lord Chief Justice.

Mr. Justice BOSANQUET.—The plaintiff was bound, by the terms of the agreement, to allow *Tupling* a commission on bad as well as good debts. The plaintiff agrees to be responsible for bad debts; the attention of the parties was therefore called to the subject. The agreement is explicit, and is not to be governed by any usage of trade. The sales alleged to have been made by *Tupling* to himself were fictitious; such entries being made merely for the purpose of covering goods disposed of by him, and for which he had received the money. The plaintiff is bound where he recognised the sales by *Tupling* to himself, but no further.

Mr. Justice ALDERSON.—The arbitrator has concluded the question by finding that the entries of the alleged sales of the 29th *December*, 1828, the 31st *January*, and the 20th *February*, 1829, “were expedients to which the said *Benjamin Tupling*, deeming the former alleged sales to himself to have been sanctioned by the plaintiff, had recourse, in order to enable him to meet deficiencies in his accounts with the plaintiff, and not for the purpose of re-selling the goods to customers of his own for a profit in the regular way of his trade.”

Rule absolute, the verdict to be entered for 112*l.* 4*s.* 6*d.*, deducting the 14*l.* 8*s.* for commission on bad debts.

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The allegation of cause at the end of the writ of *pone* is mere matter of form, and cannot be traversed.

TALBOT v. BINNS and Another.

THIS cause was commenced by writ of *justicies* in the county court of *York*. The writ of *justicies* was served on the 19th *February*, 1830. The defendants suffered judgment by default in the county court, and, on the 14th *June*, received notice of the execution of a writ of inquiry for the 29th. On the 28th, a writ of *pone* was lodged and served, to remove the cause to this Court. The writ was as follows:—

“*William* the Fourth, by the grace of God, of the United Kingdom of *Great Britain* and *Ireland* King, defender of the faith, To the sheriff of *Yorkshire*, greeting. Lay before our Justices at *Westminster*, on the 31st day of *October*, the plaint which is in your county by our writ, between *Joseph Talbot* and *Joseph Binns* and *Anthony Hornby*, of a plea of trespass upon the case; and give notice to the said *Joseph Talbot* that he be there ready to prosecute his plaint thereupon against the said *Joseph Binns* and *Anthony*, if he be willing, and have there this writ and the other writ. Witness ourself at *Westminster*, the 21st day of *June*, in the first year of our reign.

“Because the said *Joseph Binns* and *Anthony*, for the favour which the said *Joseph Talbot* hath in the said county, cannot obtain justice, as it is said, let this writ be executed, if the cause be true, and the said *Joseph Binns* and *Anthony* desire it, and not otherwise.”

The sheriff returned the writ as follows:—

“My answer to this writ appears in a certain schedule hereunto annexed.

“*Harry James Goodricke*, Sheriff.

“I, Sir *Harry James Goodricke*, Bart., Sheriff of the

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county of *York*, do humbly certify and return to our lord the King, that the writ hereunto annexed and to me directed, was delivered to me on the 28th day of *June* last past, being the day before my county court held at the castle of *York*, in and for the same county, on *Wednesday*, the 29th day of the same *June*, on which day the issue joined between the said parties named in the said writ was appointed for trial; and I did thereupon in my said county court cause the said writ to be openly read: whereupon, and before the allowance of the said writ before the suitors of the same court, then and there came the plaintiff named in the said writ, to wit, *Joseph Talbot*, and then and there alleged that the defendants named in the said writ, to wit, *Joseph Binns* and *Anthony Hornby*, had sued out and procured the said writ for the purpose of harassing him the said plaintiff by unjust and unnecessary delays, and thereby preventing the recovery of the money and damages sought to be recovered of them the said defendants by the said plaintiff in and by the said plaint; and the said *Joseph Talbot* further then and there alleged that the cause set forth at the foot of the said writ was falsely and untruly so set forth by or at the suggestion of the said *Joseph Binns* and *Anthony Hornby*; and thereupon the said *Joseph Talbot* then and there traversed and denied the truth of the cause so set forth at the foot of the said writ for the execution thereof, and offered then and there to prove that such cause so stated was untrue, and thereof put himself upon the country; and the said *Joseph Binns* and *Anthony Hornby* being solemnly called to answer the said allegations so alleged and made by him the said *Joseph Talbot*, and to prove the truth of the cause so set forth by them for the execution of the said writ, then and there neglected to make any answer, or to join issue upon the traverse so made by him the said *Joseph Talbot* as aforesaid; whereupon it was adjudged by the suitors of the

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said court that the cause assigned for execution of the said writ at the foot thereof was untrue, and therefore that I ought not to put the plaint in the said writ mentioned before his said Majesty, as within I am commanded; wherefore I could not execute the said writ, the cause therein alleged for the execution thereof not being true.

“ The answer of Sir *Harry James Goodricke*, Sheriff.”

Mr. Serjeant *Jones*, on a former day in this term, on the part of the defendants, moved that this return might be set aside.—He submitted that the allegation of cause for the writ of *pone* was mere matter of form, and was not traversable; but that the sheriff was bound to return the plaint into this Court.

Mr. Serjeant *Cross* shewed cause.—He submitted that the mandate remaining on record, the sheriff was bound to obey it to the letter; and that there was a distinction between a writ of *pone* sued out by a plaintiff, and one issued at the suit of a defendant; because, in the former case, the writ contains no allegation of the cause for issuing it, whereas, in the latter case, the writ cannot issue without alleging a cause.

Lord Chief Justice TINDAL.—The return is not the act of the sheriff, but that of the adverse party. The allegation of cause, and the injunction to the sheriff to execute the writ if the cause be true, and not otherwise, are mere matters of form, and cannot be traversed. This is proved by the practice of centuries. The *accedas ad curiam*, to remove a plaint from the Lord's Court, does not require that the sheriff shall go in person to the Lord's Court, though the language of the writ would so import.

Mr. Justice GASELEE.—Such a return as the present is not to be found in any of the books of entries.

Mr. Justice ALDERSON (a).—The writ of *pone* is not to be got rid of in this manner. A defendant might as well traverse the allegation of lurking and wandering in the *latitavit*; or, in ejectment, the tenant in possession, that *John Doe* is his loving friend.

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Rule absolute (b).

(a) Mr. Justice Bosanquet seemed to doubt the propriety of quashing the return.

(b) See Fitzherbert's *Natura Brevium*, 4, 70.—Finch, L. 444, 445.

ARNELL v. BEAN and Another.

Friday,
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THIS was an action of trespass and assault. The defendant pleaded—*first*, the general issue—*secondly*, *son assault demesne*—*thirdly*, that the plaintiff was wrongfully and unlawfully, and without the leave or licence, &c., in a certain dwelling-house, farmstead, and closes belonging to the defendant *Bean* and one *William Park*, and because he refused to go out upon request, the defendant *Bean*, and his servant, the other defendant, gently laid their hands upon him to remove him.

The word “voluntarily” in the 7 Geo. 4, c. 57, s. 32, is used to denote either an assignment made without such valuable consideration as is sufficient to induce a party acting really and *bond fide* under the influence of such consideration, or an assignment made in favour of a particular creditor spontaneously, and without any pressure on his part to obtain it.

The plaintiff replied *de injuriâ*, whereupon issue was joined.

The cause was tried before Mr. Baron *Vaughan*, at the last Assizes for the county of *York*. The object of the action was to try the right of *Bean* and *Park* to certain chattels, under the following circumstances:—

B. and *P.* were creditors of *A.* to a considerable extent, and *B.* advanced to *A.* the further sum of 70*l.* to induce him

The father of the plaintiff, who occupied a farm, was indebted to *Bean* and *Park* in the sum of 600*l.* upon a warrant of attorney and other securities. On the 6th of

to assign over his property to them as security, as well for the 70*l.*, as also for their debts: no fraud being suggested:—*Held*, that this was a purchase of a security by the further advance of the 70*l.*, and therefore an assignment not voluntary within the meaning of the 7 Geo. 4, c. 57, s. 32.

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April, 1831, the plaintiff, on behalf of his father, applied to *Bean* and *Park* for a further advance of 70*l.*, that sum being due from *Arnell* the elder to his landlord, for rent, for which the landlord was on the eve of distraining. The 70*l.* were paid by *Bean* to the landlord, upon *Arnell* the elder executing an assignment of all his personal estate, growing crops, and effects, to *Bean* and *Park*, to secure to them the amount of the antecedent debt as well as the advance of 70*l.*, the surplus, if any, to be paid to other creditors of the assignor. *Bean* and *Park* shortly afterwards disposed of part of the property, retaining possession of the growing crops. About the 20th *April*, *Arnell* the elder rendered to prison at the suit of another creditor, and petitioned the insolvent debtors' court, assigning all his estate and effects in the usual manner to the provisional assignee, who it appeared had authorized the plaintiff to take possession of the farm.

On the part of the plaintiff, it was contended that the assignment by *Arnell* the elder, of the 6th *April*, 1831, to *Bean* and *Park*, was void by the 32nd section of the statute 7 *Geo.* 4, c. 57, as being a voluntary conveyance. That section enacts—"That, if any prisoner who shall file his or her petition for his or her discharge under this act, shall, before or after his or her imprisonment, being in insolvent circumstances, *voluntarily* convey, assign, transfer, charge, deliver, or make over any estate, real or personal, security for money, bill, note, money, property, goods, or effects whatsoever, to any creditor or creditors, or to any person or persons in trust for or to or for the use, benefit, or advantage of any creditor or creditors, every such conveyance, assignment, transfer, charge, delivery, and making over, shall be deemed, and is hereby declared to be, *fraudulent and void* as against the provisional or other assignee or assignees of such prisoner appointed under this act: Provided always that no such conveyance, assignment, transfer, charge, de-

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livery, or making over, shall be so deemed fraudulent and void, unless made *within three months before the commencement of such imprisonment*, or with the view or intention by the party so conveying, transferring, charging, delivering, or making over, of petitioning the said Court for his or her discharge from custody under this act."

A verdict was taken for the plaintiff—damages one shilling, with liberty to the defendants to move to set aside the verdict and enter a nonsuit.

Mr. Serjeant *Wilde* accordingly, on a former day in this term, obtained a rule *nisi*.—He submitted that a voluntary assignment, within the meaning of the act, must be an assignment made without consideration, and voluntary in the ordinary and popular sense of the word; and that, in the present case, the assignment was for a valuable consideration, *viz.* an advance of 70*l*.

Mr. Serjeant *Cross* and Mr. Serjeant *Adams* shewed cause.—The assignment in question was avoided by the 32*d* section of the 7 *Geo.* 4, c. 57. The question whether it was made voluntarily or not was left to the jury, and is concluded by their finding. Whether voluntary or not is a question of fact, to be got at only by extrinsic evidence. The consideration for the conveyance was an antecedent debt, and the state of the case is not altered by the fact of part of the money having been borrowed on the day of the date of the instrument. The deed was at all events voluntary as regards *Park*; for, the money last borrowed was advanced by *Bean* only: the recital in the deed that the 70*l*. were borrowed of *Bean* and *Park* was therefore false. Besides, the insolvent derived no real benefit from the assignment.

Mr. Serjeant *Wilde*, in support of his rule.—The assignment was *bona fide*, and not voluntary within the

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meaning of the insolvent debtors' act. A voluntary deed is a deed executed without any present consideration. But, if there is an adequate motive operating at the time upon the mind of the party conveying, and the conveyance is for his benefit, it is good. Here, the assignment was executed by the insolvent in consideration of an advance of money to avert an impending distress; and without the security of the deed the money would not have been advanced. It has been contended that the recital in the deed, that the advance was made by *Bean and Park*, was false, as the money was in fact paid by *Bean* only. But a sum advanced by one is a good consideration for an assignment to two. Besides, an assignment may be good as to one creditor, and fraudulent or voluntary as to the others—*Morgan v. Horseman* (a)—where it was held that a deed, whereby a debtor, being pressed, conveyed estates in trust to sell and to pay the pressing creditor, with a further trust to pay his debts to certain relatives, in order to give them an undue preference, in contemplation of bankruptcy, was valid so far as related to the protection of the urgent creditor; though it might be void for the residue.

Lord Chief Justice TINDAL now delivered the judgment of the Court:—

The question reserved by the learned Judge who tried this cause was, whether the assignment made by *Arnell* the elder to *Bean and Park*, bearing date the 6th of *April*, 1831, was a voluntary assignment within the meaning of the 32nd section of the insolvent debtors' act, 7 *Geo. 4*, c. 57. By that section it is enacted, that, if any prisoner who shall file his petition for his discharge under that act, shall, before or after his imprisonment, being in insolvent circumstances, *voluntarily* assign any real or personal property, goods, or effects whatsoever, to or in trust for any

(a) 3 Taunt. 241.

creditor, every such assignment shall be deemed and is thereby declared to be fraudulent and void as against the provisional or other assignee appointed under the act.

Now, the word "voluntarily" in that section must have some proper meaning of its own, distinguishable from that of fraudulent; in the first place, because there could be no occasion to make an enactment that a fraudulent deed should be void, which the common law would of itself have declared it to be; and, in the next place, because this very section declares that assignments voluntarily made under the circumstances therein mentioned, should be deemed and were declared to be fraudulent and void. We think the word "voluntarily" is used in the statute to denote either an assignment made without such valuable consideration as is sufficient to induce a party acting really and *bonâ fide* under the influence of such consideration, or an assignment made in favour of a particular creditor spontaneously and without any pressure on his part to obtain it. If in any case a doubt arises as to the real value of the consideration, or as to the real motive of the debtor in making the assignment, such question must be decided by the jury, who will determine whether it is a *bonâ fide* transaction, or a mere collusion to evade the statute.

Now, upon the present occasion, no fraud was suggested, and therefore it was unnecessary to leave that point to the jury; and the question whether voluntary or not, arises upon the legal result of the evidence in the cause. But, when it is found that *Bean* and *Park* were creditors of *Arnell* to a considerable extent, and that *Bean* advanced to *Arnell* the further sum of 70*l.* to induce him to assign over his property to them, as security, as well for the 70*l.*, as also for their debt, in a case where no fraud is suggested, we cannot otherwise consider this than as a purchase of a security by the further advance of the sum of 70*l.*, and therefore as an assignment not voluntary within the meaning of the statute. If there had been any doubt as

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to the real nature of the transaction, or as to the real object of the parties, that point should have been left to the jury. But we think (which is all that it is necessary to decide on this occasion) that this assignment afforded a sufficient justification to the defendants under the special plea, and that the verdict should be set aside, and a nonsuit entered.

We have the less reluctance in doing this, as it will not prevent the raising the question as to the right to the property between the assignee under the insolvent debtors' act, against which assignee the statute declares the voluntary assignment to be void, and the present defendants, if it shall be thought right to try the question. The action, in its present form, is not brought for the purpose of recovering the property for the benefit of the creditors.

Rule absolute.

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PARKER and Others v. BOOTH.

Practice under
the interpleader
act.

MR. Serjeant *Cross*, on a former day in this term, on the part of the sheriff of *York*, obtained a rule calling upon the plaintiffs to shew cause why the time for returning the writ of *fieri facias* against the defendant in this cause should not be enlarged until the sheriff should be indemnified by one of the parties, there being conflicting claimants to the property seized under the writ, the defendant having become bankrupt.

The Court suggested that the motion should be for an interpleader, under the late statute 1 & 2 *Will.* 4, c. 58.

Mr. Serjeant *Jones*, for the plaintiffs, now appeared to shew cause; but, it being stated that the Court of *King's*

Bench had just made a rule upon the subject, the Court ordered the rule in this case to be made conformable with that in the *King's Bench*. The rule ultimately pronounced was as follows:—

“ Upon reading a rule made in this cause, *Monday*, the 14th *November* instant, the affidavit of *H. B.*, gent., and the affidavit of *A. D.*, gent., and upon hearing counsel as well for the sheriff of the county of *York* as for the plaintiffs, it is ordered that the said sheriff do pay over to the plaintiffs the money levied under the writ of *fiery facias* issued in this cause, ~~minus~~ the poundage, upon the plaintiffs giving security, by bond or otherwise, to the satisfaction of one of the Prothonotaries of this Court, that they, the said plaintiffs, will pay over such sum of money to the assignees when chosen under the commission of bankruptcy issued against the defendant, provided such assignees shall be found entitled to the same; or, in case the said plaintiffs shall not give such security as shall be satisfactory to the said Prothonotary, then that the said sheriff do pay the said sum of money into the hands of the Prothonotaries of this Court, to abide the event of the question as to who is entitled to the same. And it is further ordered, that the question as to who is entitled to the said sum of money, be tried by a feigned issue, in which the said assignees of the defendant are to be plaintiffs, and the said plaintiffs are to be defendants; and that the questions of poundage and costs are to be reserved until the event of such issue. And it is further ordered, that all further proceedings against the said sheriff for not returning the said writ of *fiery facias* be stayed until the further order of this Court.”

The rule was directed to be served upon the assignees of the defendant. The question as to the sheriff's costs of the application was reserved. Mr. Justice *Gaselee* seemed to think the sheriff not entitled to costs, inasmuch as he came to the Court to ask a favour (a).

(a) See the next case.

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Practice under
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act.

NORTHCOTE v. BEAUCHAMP and Others.

A RULE *nisi* was on a former day obtained by Mr. Serjeant *Wilde*, on behalf of the sheriffs of *London*, for an interpleader, in pursuance of the statute 1 & 2 Will. 4, c. 58, upon an affidavit which stated that the sheriffs had seized the goods of the defendants under an execution issued against them at the suit of the plaintiff, and that the sheriffs had received notice from the petitioning-creditor, that a commission of bankrupt had been sued out against the defendants previously to the levy, and that a provisional assignee had been duly appointed.

The Court directed that a copy of the rule should be served on the petitioning-creditor, on the provisional assignee, and on the execution-creditor.

The rule was ultimately drawn up in terms similar to the rule pronounced in the last case: and, as the goods were still remaining in the hands of the sheriffs, the Prothonotary was directed to inquire into the best mode of disposing of them, and also to ascertain which party was legally entitled to the proceeds.

Quere as to
costs of motion
under the in-
terpleader act.

Mr. Serjeant *Wilde*, for the sheriffs, submitted that they were entitled to the costs of the motion, they being captiously brought before the Court by the conflicting parties.

Mr. Serjeant *E. Lawes* preferred the like claim on behalf of the execution-creditor.

THE COURT directed that the consideration of the question of costs should be postponed, in order that they might

confer with the Court of *King's Bench* upon the subject, to the intent that the like course should be adopted in both Courts (a).

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(a) Up to the end of *Trinity* Term, 1832, nothing had resulted from the proposed conference.

ELWOOD v. PEARCE.

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ON the taxation of the bill of the attorney for the plaintiff in this cause, which amounted to 184*l.* 14*s.* 8*d.*, the Prothonotary, having struck out to the amount of 24*l.* 14*s.* 8*d.*, refused to allow the attorney the costs of the taxation.

The Court refused to allow an attorney his costs of taxation, where his bill had been reduced by nearly one sixth.

Mr. Serjeant *Wilde*, on a former day, on behalf of the attorney, obtained a rule *nisi* that the Prothonotary might be directed to allow such costs.

Mr. Serjeant *Andrews* now shewed cause.—He submitted that the sum deducted from the bill was so nearly a sixth of the whole, that the Court might in their discretion refuse to allow the costs claimed; and that, at all events, the application came too late, the attorney having already received the amount of the bill as taxed — *Whitfield v. James* (a), where it was held, that, where an attorney is entitled to the costs occasioned by the taxation of his bill, he ought to apply for them at the time, and cannot recover them by motion after a settlement.

Mr. Serjeant *Wilde*, in support of his rule.—In *Hig-*

(a) 8 L. B. Moore, 40; S. C. 1 Bing. 207.

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gins v. Woolcott (a), the statute was held to be imperative upon the Court. In the case of *Whitfield v. James*, the attorney made no application for the costs at the time of taxation, and afterwards voluntarily settled without claiming them. In *Barker v. The Bishop of London* (b), the Court say—"By statute 2 Geo. 2, c. 23, s. 23, if a sixth part of an attorney's bill be deducted, the Court are not left to their discretion, but are obliged to award costs of the taxation against the attorney; where a sixth part is not deducted, the Court are left to their discretion. The statute is a good guide; what it directs in one case seems to be a right rule in the other; ever since the statute, costs of taxation have been reciprocally given to the party charged and to the attorney, as a sixth part has or has not been taken off." There is nothing in the present case to distinguish it from the ordinary rule.

Lord Chief Justice TINDAL.—The statute directs, that, if, upon taxation, more than one sixth part of an attorney's bill be deducted, the attorney shall pay the costs of taxation; but that, if less than one sixth be deducted therefrom, the Court may in their discretion charge the client. No general rule has been laid down upon the subject; but I think this is a case in which the Court may exercise a discretion. The amount deducted being so nearly a sixth, we ought not to be called upon by an officer of the Court to allow his costs of taxation. If about 5*l.* more had been taken off by the Prothonotary, the attorney would have had to pay costs.

The rest of the Court concurring—

Rule discharged.

(a) 5 Barn. & Cress. 760; S. C. Dow. & Ryl. 589.
nomine *Dickins v. Woolcot*, 8 (b) Barnes, 147.

1831.

PALMER v. MARSHALL.

Friday,
Nov. 26th.

THIS was an action on a policy of insurance for 1,500*l.*, effected on the 20th January, 1831, on the yacht *Ruby*, at and from *Bristol to London*, by *M'Ghie & Page*, as agents for the plaintiff.

At the trial before Mr. Justice *Taunton*, at the last Assizes for the county of *Dorset*, it appeared, that, at the time the policy was effected, the *Ruby* was lying in the float at *Bristol*, where she remained till the 17th May following, when she sailed for the port of *London*, and four days afterwards was run down by a strange brig off the *Start*, to the west of *Torbay*, and totally lost. The defendant's subscription to the policy as set out in the declaration was admitted, and it was proved that the plaintiff was sole owner of the *Ruby*.

It was objected on the part of the defendant, that there was no proof that *M'Ghie & Page* were authorized to effect the insurance on behalf of the plaintiff; and that the risk was materially varied by the unnecessary and unreasonable delay in the commencement of the voyage, and consequently that the assurers were discharged.

The learned Judge over-ruled both objections—holding that the admission of the execution of the policy by the defendant was an admission of the agency of the parties therein mentioned as agents; and telling the jury that the delay in the commencement of the voyage was no variation or enlargement of the risk, inasmuch as the policy did not attach until the sailing of the vessel.

The jury upon this direction found a verdict for the plaintiff.

Mr. Serjeant *Wilde*, on a former day in this term, obtained a rule nisi that this verdict might be set aside and

A policy was effected on a yacht "at and from *Bristol to London*:"—Held, that the risk attached immediately on the execution of the policy; and that a delay of four months in the sailing of the vessel was a material variation of the risk, and avoided the policy.

An admission of the subscription of the underwriter to a policy, does not dispense with proof of the agency of the party effecting the insurance.

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a new trial had, on the grounds of misdirection, and that the verdict was against evidence.

Mr. Serjeant *Mercwether* now shewed cause.—There is no ground for disturbing the verdict. The plaintiff was proved to be the sole owner of the yacht, and the policy was effected by *M'Ghie & Page* as agents; the insurance must therefore be assumed to have been effected by them as the agents of the plaintiff.

With respect to the question as to the supposed variation of the risk, it was properly submitted to the jury, and their finding is conclusive. According to the usage of the *Newfoundland* trade, when ships arrive on the coast, they are either employed for some time in fishing (called banking), or they make an intermediate voyage in the *American* seas, before beginning to take in their homeward cargo, during which they are protected by a separate policy; in *Vallance v. Dewar (a)*, it was therefore held, that, in effecting a policy, "lost or not lost, at and from *Newfoundland* to a port in *Europe*," although the ship is to be employed in banking, it is not necessary to disclose the fact to the underwriters, as their risk only commences from the time when the banking or intermediate voyage ends, and they are bound to know the nature and circumstances of the branch of trade to which the policy relates. In *Williamson v. Innes (b)*, in *assumpsit* on a policy of insurance on freight "at and from *Algoa Bay* and *Table Bay*, both or either, to *London*, the declaration stated, that the ship had arrived and was in good safety at *Algoa Bay*, that a homeward cargo was ready for her under her charterparty, and that before it was put on board the vessel was lost by perils of the sea. It appeared in evidence, that the ship arrived at *Algoa Bay* on the 30th *September*, and was engaged in discharging her

(a) 1 Camp. 503.

(b) MS. *Erchequer*, E. T. 1831.

ard cargo until the 8th *October*; and that, on the 8th, the captain had intended to take in part of the homeward cargo, which was ready; but, on the night of the 8th, the ship was lost. Lord *Lyndhurst* told the jury, that, if the ship was in a condition to begin to take in her homeward cargo, the plaintiff was entitled to recover; if not, then the verdict ought to be for the defendant. The jury found for the plaintiff. In *Mount v. Larkins* (a), this question was concluded by the finding of the jury, "that there was unreasonable and unjustifiable delay between the making of the policy and the commencement of the risk intended to be insured against."

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Mr. Serjeant *Wilde*, in support of his rule, was stopped by the Court (b).

Lord Chief Justice TINDAL.—I think the matter ought to be investigated by another jury. The learned Judge who tried the cause did not, in my opinion, accurately state to the jury at what time the risk commenced. The policy was, "*at and from Bristol to London*." The plaintiff has not brought himself within any of the excepted cases—as, where the ship is incomplete at the time of insuring, or is under repair. But this is the ordinary case of a vessel lying in port in a state fit for sea; in which case the liability of the underwriter attaches from the time the policy is effected. Besides, the evidence as to the agency of *M'Ghie & Page* was not complete. The defendant admitted his subscription to the policy, it is true; but the policy bore on the face of it a representa-

(a) *Post*, p. 165.

(b) He referred to the case of *Permeter v. Cousins* (2 Camp. 235). Policy at and from the island of *St. Michael's*. The ship arrived there in a very disabled

state, and, after lying at anchor twenty-four hours in great danger from a storm, was blown out to sea and wrecked:—Held, that the policy on the homeward voyage never attached.

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tion which the plaintiff was bound by the statute (a) to prove. On both grounds, I think there ought to be a new trial. I shall, therefore, abstain from making any remarks upon the evidence.

Mr. Justice GASELEE.—In the cases where the risk of the assurer has been held not to attach until the sailing of the vessel from the particular port, the general rule has given way to the custom of trade. There is nothing, however, in the present case, to take it out of the ordinary rule applicable to insurances. I therefore concur in thinking that the point was not correctly left to the jury: nor was the question of agency, in my view of the case, rightly decided.

Mr. Justice BOSANQUET.—Upon a policy of insurance at and from a certain port, the risk attaches on the subscription of the policy. Here, the risk attached at *Bristol*. The admission of the defendant's subscription of the policy did not dispense with proof of the agency of *M'Ghie & Page*, as required by the statute. On both grounds, therefore, I think it desirable that there should be a new trial.

Rule absolute (b).

(a) 25 Geo. 3, c. 44.

(b) On the second trial, before Mr. Justice Park, at the *Dorchester Spring Assizes*, 1832, the learned Judge stating that he should leave the case to the jury with a strong intimation of opinion that the delay had been unreasonable, and consequently that the defendant was entitled to a verdict, the plaintiff's counsel

elected to be nonsuited. On a motion for another trial, made in *Easter Term* following, the Court held, that the delay in the sailing of the yacht, unaccounted for by the plaintiff, was such an unreasonable delay as to avoid the policy; the risk of the assurer being thereby materially increased.—*Vide post*, *Easter Term*; also 8 Bing. 317.

1831.

MOUNT v. LARKINS.

Friday,
Nov. 25th.

THIS was an action of *assumpsit*, on a policy of assurance, dated the 28th *February*, 1824, on the ship *Aquila*, *Watson*, master, lost or not lost, at and from *Sincapore* and *Batavia*, both or either, to the ship's port or ports of discharge in *Europe*, with liberty to sail to, touch, and stay at any ports or places whatsoever and wheresoever, particularly at the *Cape of Good Hope*, *St. Helena*, or elsewhere, to load, unload, and re-load goods and passengers, or otherwise, and for all or any other necessary purposes whatsoever. The policy was declared to be on freight of goods, and the freight valued, and a total loss of the ship was averred, by the perils of the sea, on the voyage from *Sincapore* to *London*, whereby the freight became wholly lost to the plaintiff.

At the trial, before Lord Chief Justice *Tindal*, at *Guildhall*, the jury found a special verdict, which stated that the policy was made and entered into between the plaintiff and the defendant on the 28th *February*, 1824; that the ship *Aquila* sailed from *England* in the beginning of *September*, 1823, having on board divers passengers and goods bound for and deliverable at the *Cape of Good Hope*, *Van Dieman's Land*, and *Sydney*, *New Holland*, and was under the command of *Joseph Thomas Watson*, the master thereof; that, by a charterparty, dated the 26th *May*, 1823, the ship, after discharging her cargo at *New Holland*, was to proceed to *Sincapore*, and from thence to *Malacca* and *Penang*, both or either; or to *Batavia* only, to take on board a cargo for *Europe*, on

On the 28th *February*, 1824, a policy was effected (on freight, valued) upon the ship *Aquila*, "at and from *Sincapore* and *Batavia*, both or either, to the ship's port or ports of discharge in *Europe*;" with liberty "to sail to, touch, and stay at any ports or places whatsoever and wheresoever, particularly at the *Cape of Good Hope*, *St. Helena*, or elsewhere, to load, unload, and reload goods and passengers, or otherwise, and for all or any other necessary purposes whatsoever." The ship sailed from *London* in the beginning of *September*, 1823, and arrived at *Sincapore* on the 30th *March*, 1825. In an action on the policy, for a total loss, the jury returned a special verdict, in which, after setting out particular instances of delay in the

course of the voyage on the part of the captain, they found "that there was unreasonable and unjustifiable delay between the making of the policy and the commencement of the risk intended to be insured against."—*Held*, that such unreasonable and unjustifiable delay on the part of the assured in commencing the voyage insured against, was in the nature of a deviation, and amounted to such an alteration of the risk insured against as to discharge the liability of the underwriters upon the policy.

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account of the freighters; and that, before the ship sailed from *England*, as aforesaid, the plaintiff caused instructions to be delivered to *Watson*, the master of the said ship, of which the following is a copy:—

“ You having the command of the ship *Aquila*, bound on a voyage to the *Cape of Good Hope*, *Van Dieman's Land*, and *New South Wales*, and from thence to *Singapore*, and other ports of lading, as *per* charterparty, and having shipped twenty-four hogsheads of stout, and a quantity of deals, consigned to yourself for sale on my account—copy of invoice at back of this—you will please dispose of them to the best account, taking care not to leave them behind you unsold. As you have a small quantity of goods to deliver at the *Cape*, should you be able to procure any goods and passengers from that place to *New Holland*, &c., to the amount of not less than from 300*l.* to 400*l.*, and at the same time be able to dispose of my investment at about the invoice price, by detaining the ship not more than ten days, you will use your own discretion; but think it will answer your purpose so to do. On your arrival at *Van Dieman's Land*, as you will have a very considerable sum of money to receive as freight and passage money, I beg your particular attention to the same. You will please to caulk the half deck and between decks, as soon as convenient, fearing any leak might damage the cargo stowed below; and think the less water there is used for washing below, the better, fearing the consequences above stated. After leaving *Van Dieman's Land*, you will proceed to *New Holland*, making every exertion in your power at that port to enable you to proceed to *Singapore*, at which port hope and trust you will be fully loaded; and, on your arrival at said port or ports, you will give the earliest information to commence your lay days, and let me beg of you to make all the interest you can with the merchants for heavy goods, to ex-

tend from 200 to 300 tons, your ship requiring a large proportion, and will prove a great advantage in point of freight; and as you are not likely to get many passengers home, and should suppose you will have a large proportion of light goods, you will make the best you can with your accommodation, and, if necessary, take down the aft bulk heads, but the after cabin would advise you not to disturb. Proportion of cabin freight, you will of course be entitled to. Shall be happy to hear from you at every convenient opportunity, at sea or in port.

“ *Richard Mount.* ”

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That the ship arrived at the *Cape of Good Hope* on the 3rd *December*, 1823, and sailed from thence on the 24th of the same month; that, on the second day after the ship anchored at the *Cape of Good Hope*, part of the cargo belonging to *Watson*, the master, was discharged; that, at the time of making the policy, the ship was at *Hobart's Town, Van Dieman's Land*, she having arrived there on the 4th *February*, 1824; that part of the outward cargo, and three of the passengers, were landed at *Hobart's Town*, and some delay was occasioned there by the difficulty in getting at different parts of the cargo; that the ship sailed from *Hobart's Town* on the 27th *March*, 1824, arrived at *George Town, Port Dalrymple, in Van Dieman's Land*, on the 6th *April*, 1824, and there landed others of the said passengers, and other parts of the cargo; that the said passengers and cargo were necessarily conveyed by the boats of the ship a distance of forty miles from the ship up the river there; that the ship sailed from *George Town* for *Sydney, New Holland*, on the 29th *July*, 1824, arrived at *Sydney* on the 5th *August* following, there landed the remainder of her passengers and of her said outward cargo, and sailed from *Sydney* on the 18th *November* in the same year for *Sincapore*; that she met with very bad weather, was twice driven back,

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once to *Sydney* and once to *Hobart's Town*, and arrived at *Singapore* on the 30th *March*, 1825, where the risk intended to be insured by the policy was to commence; that she sailed from *Singapore*, on the voyage intended to be insured, on the 3rd *May*, 1828, arrived at *Penang* on the 17th *May* in the same year, and remained there until the 23rd *June* following, when she proceeded on her voyage towards *London*; that, at the time when the risk by the policy intended to be insured against was to commence, the ship was well and sufficiently manned, and in all respects seaworthy; and that, whilst she was proceeding upon the voyage in the policy mentioned, and during the continuance of the risk intended to be insured against thereby, she was, by perils of the sea, wholly lost, as in the declaration was alleged.

It was then found, that *Watson*, the master of the said ship, after his arrival at *Hobart's Town* as aforesaid, was ashore, and came on board the ship frequently, and was building a house upon some land belonging to him there; that he also, whilst at *Hobart's Town*, purchased a schooner, which he fitted out and sent to sea on a sealing voyage in the early part of *April*, 1824; that the schooner was fitted out from the stores of the ship *Aquila*, was partly manned with mariners, part of her crew, was commanded by the chief mate of the *Aquila*, and was absent about two months; that the schooner returned from the sealing voyage on which she had been dispatched, and was again sent upon a second sealing voyage; that the schooner had not returned from her second sealing voyage before the *Aquila* left *Sydney*, which was on the 18th *November*, 1824; and that the mate and the crew of the schooner never again joined the *Aquila*. The jury then found that there was unreasonable and unjustifiable delay between the making of the policy of insurance and the commencement of the risk intended to be insured against as aforesaid; that the plaintiff was, at the time of the making of the policy, and continually

until and at the time of the loss of the ship as aforesaid, interested in the same to the amount of the sum insured thereon as aforesaid. But whether, &c. &c.

The case came on for argument in the last term.

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Mr. Serjeant *Taddy*, for the plaintiff.—The jury have found “that there was unreasonable and unjustifiable delay between the making of the policy of insurance and the commencement of the risk intended to be insured against;” but they have not found that such risk was thereby increased, nor that the plaintiff was at all accessory to the delay: the question therefore is, whether, on a policy effected on a ship abroad at the time of insuring, the risk to commence from the time of the ship’s sailing from a foreign port, the mere fact of an unreasonable delay in the commencing the voyage insured affords a ground of defence to the assurers; or, in other words, whether there is any implied warranty on the part of the assured that the vessel shall sail within any given time. This is not a case of deviation, for that presupposes the commencement of the risk; neither is it a case of abandonment, for the parties clearly did not understand the contract to be at an end. To constitute a warranty, there must be an express stipulation on the face of the policy. *Pawson v. Barnwell* (a), *Bird v. Fletcher* (b). If there has been no fraud, or increase in the risk, the only consideration is, whether there has been a sufficient compliance with the representation. The general rule is, that, where it is intended that the risk shall commence or the voyage be performed within a limited time, it must be so expressed in the policy. In *Emerigon* (c) the following case is stated: “*Les sieurs Garnier, Mallet, et Dumas, de Cadix, s’ étaient rendus assureurs sur le corps du vaisseau Nostra Senora Oran-*

(a) 1 Doug. 12, n.

(b) 1 Doug. 13.

(c) Vol. 2, c. 13, s. 2, pl. 4, page 16.

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zaza, capitaine Joseph Ventura, de sortie de Cadix jusqu'à Cumana et de retour à Cadix. Le 19 Decembre, 1752, ils se firent réassurer à Marseille 18,000 liv.; avec clause qu'en cas de perte ils ne seraient tenus de produire d'autre sorte d'écriture que le seul acquit du paiement qu'ils en auraient faits aux premiers assurés. Ce navire arriva heureusement à Cumana, dans L'Amerique Meridionale. Il y fit un long séjour. En 1756, Garnier, Mallet, et Dumas se pourvurent au consulat de Cadix, en résiliation du risque attendu le trop long séjour que le navire faisait à Cumana; ils furent déboutés de leur requête. Enfin, ils apprirent que le navire était devenu innavigable à Cumana. Cet accident fut notifié aux réassureurs de Marseille par exploit du 2 Juin, 1761. Le consulat de Cadix condamna Garnier, Mallet, et Dumas à payer la perte. Ils la payèrent par quittance du 26 Avril, 1762. Le 4 Septembre suivant les sieurs Kick et Durantet, porteurs de la police de réassurance, se pourvurent contre les réassureurs, et communiquèrent la quittance dont je viens de parler. Les réassureurs opposaient que le risque s'était évanoui par le laps de dix années; et qu'un navire qu'on laisse croupir pendant si long temps dans un port ne peut que devenir innavigable. Sentence du 26 Juin, 1764, qui régla la cause à droit sur le fond et principal, et qui condamna les réassureurs au paiement provisoire des sommes réassurées. Ceux-ci appelèrent de cet sentence au chef du provisoire. Ils obtinrent un décret de surséance. Arrêt du 26 Juin, 1765, au rapport de M. de Fortis, qui révoqua le décret de surséance, et qui confirma la sentence, avec amende et depens. Ensuite de cet arrêt, tous les réassureurs, à l'exception de B., qui avait fait faillite, payèrent les sommes par eux réassurées, en principal, intérêts, et depens, et renoncèrent à la poursuite du fond. Seconde sentence rendue le 15 Novembre, 1766, qui condamna les administrateurs de la faillite de B. à payer définitivement la somme de 2,000l. livres par lui souscrite, et qui les y condamna sous l'hypothèque

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du 12 Décembre, 1752, jour de la réassurance reçue par courrier. Cette dernière sentence fut acquiescée." Upon this Emerigon observes—" On ne saurait disconvenir que les réassureurs étaient non recevables à contester le remboursement d'une perte payée par les premiers assureurs dont ils étaient garans. Mais il paraît dur qu'un navire devenu innavigable dans un port lointain, où on le laissoit oisif pendant plusieurs années, soit à la charge des assureurs. Cependant, s'il n'y a aucune fraude de la part des assureurs assurés, la règle générale est pour ceux-ci. La loi n'a établi sur ce point aucun délai fatal; et les assureurs doivent s'imputer de n'avoir pas limité le tems de l'assurance. Car si la police renferme quelque pacte particulier au sujet de tout ce que dessus, il faut s'y tenir."

The same rule was laid down by Lord *Ellenborough*, in the case of *Beckwith v. Sidebotham* (a), where it was held, that, if the owner of a ship receives a letter from a captain, written on her arrival in a foreign port, giving such an account of her as to render it probable that she must remain there, for the purpose of being repaired, beyond the time that would be necessary for her to take in her cargo, the letter need not be communicated to the underwriters in effecting a policy of insurance upon her, at and from such foreign port to a port in *England*, unless information on the subject be particularly called for. His Lordship there said, "that, if it was necessary to have disclosed this letter as governing the time when the ship would sail, it would in all cases be necessary to inform the underwriters where any repairs were wanting; and he believed it very frequently happened that a ship must have something done to her before she would sail on her homeward-bound voyage. If the underwriters wish to have particular information upon this subject, they ought to ask for it; and if they were disposed only to insure a

(a) 1 Camp. 118.

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voyage made during a particular season of the year, they should (as was commonly done with *Jamaica* ships) insert a warranty in the policy that the ship shall sail on or before a certain day." *Emerigon* also in the same book states another case to this effect:—" *En 1753, un négociant s'était fait assurer in quovis 8,000 livres en espèces d'or et d'argent qu'il attendait de Buenos Ayres. En 1764, les assureurs requièrent que les risques fussent déclarés fins. L'assuré soutenait que ses fonds n'étaient pas encore arrivés, et que la police ne renfermait aucune terme. Sentence de l'Amirauté de Paris, qui déchargea les assureurs, sur le fondement que les risques ne doivent pas être éternels, et que onze ans d'attente doivent suffire.*" That was the case of an application by the assurers to the French Court of *Admiralty* to have the risk put an end to. The same general principle is laid down by *Potier* (a). "*Que si le tems qui doivent durer les risques des retours qu'on fait assurer n'était par limité arbitrio judicis, les assureurs seraient exposés à être trompés tous les jours; car la rentrée de ces retours étant le plus souvent inconnue aux assureurs, un négociant de mauvaise foi, après avoir reçu en entier les retours qu'il a fait assurer, pourrait long tems après faire valoir l'assurance sur des marchandises qu'il aurait perdues, en disant, contre la vérité, qu'elles font partie des retours qu'il a fait assurer.*"

From all the authorities, therefore, the general rule seems clear, that, where the parties have not limited the time for the commencement of the risk, the law does not supply any limit within which the vessel is to sail. A change from peace to war, even, will not affect the policy (b).

The jury have not found that there was any fraud on the part of the assured, or that the delay in the commence-

(a) *Contrat d'Assurance*, c. 1, s. 2, pl. 63, page 102.

(b) *Emerigon*, Vol. 2, c. 13, s. 2, p. 18.

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ment of the risk in any degree varied it; and there is no stipulation on the face of the policy, that the vessel should sail by any particular time. The finding of the jury is therefore immaterial. The Court cannot imply a warranty which the assurers have not thought fit to express.

Mr. Serjeant *Spankie*, *contra*.—Upon every contract of assurance, there is an implied condition on the part of the assured that the voyage insured shall commence within a reasonable time. *Emerigon* says (a): *La condition dépend de l'expédition maritime plutôt que de la volonté de l'assuré.* In estimating his risks, the assurer must be presumed to take into consideration proximate and not remote events; the peril to be insured against must be incurred within a reasonable computation of time: remote contingencies are not to be supposed to be in the contemplation of the contracting parties. The same author again observes (b)—“*Si le voyage est autre que celui qui a été assuré l'assurance reste caduque.*” By the law of France, an assurer may apply to the Court to be relieved from the risk, as in the case put by *Emerigon* (c). In such a case, the *arbitrium juris* there is like the decision of a jury here, pronouncing upon the reasonableness or unreasonableness of the delay complained of. *Emerigon*, speaking of the practice of making intermediate voyages pending a contract of insurance, after having cited two decisions of the French Court wherein such intermediate voyages had been held not to vitiate the policy, remarks (d): “*Mais cette jurisprudence était contraire au principe établi dans la précédente section, et à la doctrine de tous nos auteurs, qui nous apprennent que, si, avant que le voyage assuré soit commencé, le capitaine en entreprenne un autre, l'assurance est nulle, et la prime doit être restituée.*” In all cases

(a) Vol. 1, c. 13, s. 3.

(b) Vol. 1, c. 13, s. 9.

(c) Vol. 2, c. 13, s. 2, p. 16.

(d) Vol. 1, c. 13, s. 10.

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where there is no stipulation as to the time when the contract shall be performed, it is an implied condition that it shall be performed within a reasonable time—*Viner's Abridgment* (a), *Coke Littleton* (b), *Bothy's case* (c); and the question of reasonableness or unreasonableness is for the jury. In *Anderson v. The Royal Exchange Assurance Company* (d), a vessel sailing with corn, insured from *Waterford* to *Liverpool*, by a policy with a memorandum to be free from all but general average, was stranded near *Waterford* on the 28th of *January*, and the vessel continued, at high tide, under water for near a month, during which time, from the 31st, the assured, at low water, were employed in saving the cargo, the whole of which was damaged, but the greater part recovered and kiln-dried; but no notice of abandonment was given to the underwriters in *London* till the 18th *February*, which was holden to be out of time: for, whether or not, upon such a policy, where there was an opportunity of sending on the corn which was saved to the place of its destination within two months after the accident, in another vessel, the assured were entitled to abandon as in case of a total loss, at all events they ought to have made their election to abandon within a reasonable time (on which it seems that the Judge ought to instruct the jury, under the circumstances of the case), and they cannot take the chance of endeavouring first to save and make the best of the cargo on their own account, and afterwards abandon when they find that they cannot turn it to their advantage. *Parker v. Palmer* (e) proceeds upon the same principle. There, the defendant bought of the plaintiff a quantity of rice *per sample*, according to the conditions of sale, to be put up by the proprietors, if required, at a certain price

(a) Title "Condition," (C. b.),
pl. 7, Vol. 5, p. 189.

(b) Co. Litt. 208. a.

(c) 6 Rep. 31.

(d) 7 East, 38; S. C. 3 Smith,
48.

(e) 4 Barn. & Ald. 399.

therein mentioned, and it did not correspond with the sample, but the defendant, after seeing fresh samples, inferior in quality to the original purchase sample, put it up for sale at a limited price, and, no bidding taking place to that extent, he bought it in—it was held that he could not afterwards repudiate the contract. This principle will be found to pervade the whole of the common law in cases of contract. In *Driscoll v. Passmore* (a), the jury found that the master of the vessel insured was justified in the course he took, to avoid danger. In *Vallance v. Dewar* (b), where it appeared to be the usage of the *Newfoundland* trade, that, when ships arrive on the coast, they are either employed for some time in fishing (called banking), or they make an intermediate voyage in the *American* seas before beginning to take in their homeward cargo, during which they are protected by a separate policy—it was held, that, in effecting a policy “lost or not lost, at and from *Newfoundland* to a port in *Europe*,” although the ship is to be employed in banking, it is not necessary to disclose the fact to the underwriters, as their risk only commences from the time when the banking or intermediate voyage ends; for they are bound to know the nature and circumstances of the branch of trade to which the policy relates (c). In *Ougier v. Jennings* (d), where the question turned upon the above-mentioned usage in the *Newfoundland* trade, as to intermediate voyages, Lord *Eldon*, in his summing up, says—“If the evidence leads to this, that the ship may make an intermediate voyage of several years, it is too dangerous for you to give effect to it. If several ships belonging to a merchant arrive together at *Newfoundland*, and, finding cargoes for some only, he *bona fide* sends the rest on an intermediate voyage, it seems reasonable.” In *Hull v. Cooper* (e), it was held,

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(a) 1 Bos. & Pul. 200.

Doug. 510.

(b) 1 Camp. 503.

(d) 1 Camp. 505, n.

(c) See *Noble v. Kennaway*, 2

(e) 14 East, 479.

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that, if a ship be insured at and from a certain place, where in fact she is not at the time, but arrives there after some interval (but the fact is not communicated to the underwriters, who do not call for information on the subject), it is a question for the jury whether the delay which intervened materially varied the risk (a); Lord *Ellenborough* there said (b): "When a broker proposes a policy to an underwriter on a ship at and from a certain place, it imports either that the ship is there at the time, or shortly will be there; for, if she is only to be there at a distant period, that might materially vary the risk. But it has never been understood that the terms of such a policy necessarily imported that the ship was at the place at the very time. It was a question for the jury whether the intervening period materially varied the risk in this instance."

[Mr. Justice *Park* referred to *Smith v. Surridge* (c), where Lord *Kenyon* says; "that, if there was a voluntary delay on the part of the plaintiff, there was no doubt it would avoid the policy:" and Mr. Justice *Gaselee* referred to *Hartley v. Buggin* (d), where it was held, that, if a ship be insured upon a trading voyage, it is incumbent on the assured to carry on that trade with usual and reasonable expedition, otherwise their conduct will amount to a deviation, and discharge the policy.]

The case of *Beckwith v. Sidebotham* does not apply: the question there turned upon the necessity of communicating to the underwriters a letter received by the assured from the captain of the vessel. In the present case, it was the duty of the assured to prosecute the voyage with reasonable diligence and despatch: the arrival of the vessel at *Singapore* within a reasonable time was a con-

(a) See *Palmer v. Marshall*, ante, p. 161, *et post*, *Easter Term*. (d) 2 Park, Ins. 468; S. C. 1 Marsh. Ins. 194. See also *Parkinson v. Collier*, 2 Park, Ins. 476.

(b) 14 East, 480.

(c) 4 Esp. Rep. 25.

dition precedent to the attaching of the risk; and it must be inferred that the delay increased the risk.

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Mr. Serjeant *Taddy*, in reply.—The present case is distinguishable from *Driscoll v. Passmore*, *Vallance v. Dewar*, *Ougier v. Jennings*, *Smith v. Surridge*, and *Hartley v. Baggin*, in all of which the questions were either whether there had been a deviation from the voyage insured, or whether the representations made at the time of insuring had been complied with. *Beckwith v. Sidebotham*, and *Hall v. Cooper*, on the contrary, are authorities to shew, that, if the underwriter wish to limit the period for commencing the risk, such limitation must be inserted in the policy. The only question here is, whether the Court can imply a warranty that the ship should arrive at the place of inception of the risk at a given time. The case stated in *Emerigon* (c. 13, s. 10) is one where *another voyage* is undertaken before the voyage insured is commenced. But here there was no change of voyage, no intermediate adventure.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court, as follows:—

This was the case of an action brought upon a policy of assurance made at *London* on the 28th February, 1824, upon the ship *Aquila* at and from *Singapore* and *Batavia*, both or either, to the ship's port or ports of discharge in *Europe*, not to the northward of *Hamburg*, with liberty to call at *Coores* for orders. A liberty was also given in the policy "to sail, to touch, and stay at any ports or places whatsoever and wheresoever, particularly at the *Cape of Good Hope*, *St. Helena*, or elsewhere, to load, unload, and reload goods and passengers or otherwise, and for all or any other necessary purposes whatsoever." The policy was declared to be on freight, and the freight

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valued. The declaration stated a total loss of the ship while proceeding on the voyage from *Singapore* to *London*, being the voyage mentioned in the policy, by the perils of the sea, whereby the freight became wholly lost to the plaintiff. Upon the trial of the cause, the jury found a special verdict, of which the only facts material for the consideration of the question which has been argued before the Court, are the following:—That the policy was made on the 28th February, 1824, at which time the ship was at *Hobart's Town*, in *Van Dieman's Land*; that the ship sailed from *England* in the beginning of September, 1823, under a charterparty, by which the ship, after discharging her cargo at *New Holland*, was to proceed to *Singapore*, from thence to *Malacca* and *Penang*, both or either, or to *Batavia* only, to take on board a cargo for *Europe*. The special verdict, after stating the course of the ship's voyage from *England* to the *Cape of Good Hope*, *Hobart's Town*, to *George Town*, in *Van Dieman's Land*, and to *Sydney*, in *New Holland*, found that she arrived at *Singapore* on the 30th March, 1825, where the risk intended to be insured against was to commence. It then stated the sailing on the voyage homeward, and the total loss; and, after setting out many particular instances of delay in the course of the voyage on the part of the captain, there is an express finding by the jury that there was unreasonable and unjustifiable delay between the making of the policy of assurance and the commencement of the risk intended to be insured against. Upon this special verdict it has been argued before us, on the part of the defendant, that the unreasonable and unjustifiable delay on the part of the captain in completing the outward voyage, on which he was then engaged, and commencing the homeward voyage, on which the risk was intended to attach, discharged the underwriters from this policy; and we are of opinion, that such unreasonable and unjustifiable delay on the part of the assured in commencing the voyage in-

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insured against, is in the nature of a deviation, and does amount to such an alteration of the risk insured against as to discharge the liability of the underwriters upon this policy. That an unreasonable delay in commencing the voyage insured against after the policy has actually attached discharges the underwriters from the policy, appears not only from the reason of the thing itself, but from the opinion of Lord *Kenyon* in *Smith v. Surridge* (a). In that case, the ship *Resolution* being insured "at and from *Pelaw* to *London*," it was proved she remained a considerable time at *Pelaw* to complete her repairs before she commenced her voyage. An objection was taken that such delay avoided the policy; and Lord *Kenyon* said—"If there was any unreasonable delay on the part of the insured, there was no doubt it would avoid the policy;" though he afterwards observed—"The delay in that case was not a voluntary delay, not such as amounted to a discharge of the policy." Again, that an unreasonable delay in performing the voyage insured is equivalent to a deviation, was expressly ruled in the case of *Hartley v. Buggin*, where a ship, insured "at and from the coast of *Africa* to the *West Indies*, with liberty to exchange goods and slaves," stayed several months beyond the usual stay of ships in that trade, the Court of *King's Bench* decided that this was equivalent to a deviation; and Lord *Mansfield* said—"The single point before the Court is, whether there has not been what is equivalent to a deviation—whether the risk has not been varied; no matter whether the risk has or has not been thereby increased." The same principle is admitted in the cases of *Vallance v. Dewar* (b) and *Ongier v. Jennings* (c), in both of which it is admitted that a delay in the commencement of the risk, by the interposition of an intermediate voyage not communicated to the underwriters, would discharge the policy, unless such

(a) 4 Esp. Rep. 25.

(b) 1 Camp. 306.

(c) 1 Camp. 306, n.

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intermediate voyage was one which was made usually and according to the course of the trade in which the ship was then engaged, which would be equivalent to notice to the underwriters. In the present case, at the time the policy was effected, the ship was then actually in the course of performing her outward voyage under her charter, and the risk upon the policy was not to commence until the outward voyage was completed by the arrival of the ship at *Singapore*; and it is argued by the assured, that, although unjustifiable delay before commencing or in performing the voyage itself which is insured amounts to a deviation, no such delay in completing the outward voyage, upon which the ship is then known to be engaged, will have the same consequences, inasmuch as with that voyage the policy in question has no concern. But, if the principle above laid down be sound when the delay takes place *after* the risk has actually commenced, in reason and sense it applies equally to the case of the voyage insured, where the risk is *not to commence* until the completion of the outward voyage. The reason upon which a deviation discharges the insurer is, not that the risk is thereby increased, but because the assured has, without necessity, substituted another voyage for that which was insured, and thereby varied the risk which the underwriter took upon himself. It must be admitted, that, if the policy had been effected upon this ship at and from *Singapore*, the ship then being at *Singapore*, unreasonable and unjustifiable delay at *Singapore* would have avoided the policy. Why, but because the voyage commenced after an unreasonable interval of time would have become a voyage at a different period of the year, at a more advanced age of the ship, and, in short, a different voyage than if it had been prosecuted with proper and ordinary diligence; that is, the risk would have been altered from that which was intended by all parties when the policy was effected. But what is the difference with respect to

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the alteration of the voyage, whether this unreasonable and unjustifiable delay takes place in the ship's voyage to *Singapore*, or after the ship is at *Singapore*. The underwriter has as much right to calculate upon the outward voyage, on which the ship is then engaged, being performed within a reasonable time, and without unnecessary delay, in order that the risk may attach, as he has that the voyage insured shall be commenced within a reasonable time after the risk has attached. In either case the effect is the same as to the underwriter, who has another risk substituted instead of that which he has insured against; and in both cases the alteration is occasioned by the wrongful act of the assured himself. But the principle contended for by the defendant, seems to be established as law by the case of *Hull v. Cooper* (a); in that case Lord *Ellenborough* said—"When a broker proposes a policy to an underwriter, on a ship at and from a certain place, it imports either that the ship is there at the time; or shortly will be there." In that case the question turned upon the point of *concealment*, the situation and circumstances of the ship being known to the assured, but not communicated to the underwriter. In the present case, it is true, no such question can arise, as the assured at the time the policy was effected was ignorant of the particular place where the ship was, and of the misconduct of the captain. But the principle stated by Lord *Ellenborough* in his judgment in that case, namely, that a delay in the arrival of the vessel at the place where the risk is to attach, alters the risk of the insurer, applies to the present case. And here, as the jury have expressly found that the delay before the ship arrived at the port where the policy was first to attach, was unreasonable and unjustifiable, we must intend that the risk was in fact varied, and, con-

(a) 14 East, 475.

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sequently, that the underwriter is discharged from the policy. We therefore give—

Judgment for the defendant.

Friday,
 Nov, 25th.

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The plaintiff chartered a ship to the defendant, from *London* to *Madeira*, and the *Cape of Good Hope*, and thence to *Bombay*, and back to *London*. Instead of proceeding by the direct and usual course from the *Cape of Good Hope* to *Bombay*, the captain made a deviation to the *Mauritius*, and the defendant's agents at *Bombay*, in consequence of such deviation, refused to find a cargo. In an action by the owner against the defendant for not loading the ship with a cargo at *Bombay*, pursuant to the charterparty, it was left to the jury to say whether the deviation was of such a nature

THIS was an action of *assumpsit* upon a charter by the plaintiff to the defendant, of the ship *Edward Lombe*, from *London* to *Madeira* and the *Cape of Good Hope*, and thence to *Bombay* and back.

The declaration stated, that, by a certain charterparty of affreightment made between the plaintiff, therein described as owner of the ship or vessel called the *Edward Lombe*, of the burthen of three hundred and forty-seven tons, registered measurement, or thereabouts, whereof the plaintiff was commander, then lying in the port of *London*, of the one part, and the defendant, therein described as freighter of the said ship, of the other part, it was witnessed that the said owner, for the consideration therein mentioned, did thereby promise and agree with and to the said freighter, his executors, administrators, and assigns, that, the said ship being tight, staunch, and strong, and every way properly fitted, victualled, and manned as was usual for vessels in the merchant-service, and for the voyage thereafter named, the commander of the said ship, or some other proper person in his stead, should and would receive and take on board the said ship in the *West India Dock*, in the aforesaid port of *London*, such quantity of lawful merchandize as the said freighter might

and description as to deprive the freighter of the benefit of the contract into which he had entered; and they were told, that, if such was their opinion, the defendant was excused by the act of the plaintiff from furnishing a cargo. The jury having found for the defendant—The Court refused to grant a new trial, holding the direction right.

think proper to ship, not exceeding what the said ship would reasonably stow and carry in the lower hold, reserving sufficient space for fifteen chaldrons of coals, which the owner was allowed to stow therein on his own account; the cabins and between decks of the vessel being also reserved for the benefit of the owner and commander; and that, having received the same on board, and being dispatched therewith not later than the 20th *May* then next ensuing, the said commander, or some other proper person in his stead, should and would, wind and weather permitting, set sail and proceed with the said vessel to *Madeira* and the *Cape of Good Hope*, where having discharged or disembarked any goods or passengers destined for those places, she should, with all convenient speed, proceed to *Bombay*; and, being arrived there, or so near thereto as the ship could safely get, and being ready to discharge the aforesaid goods, the said commander, or some other proper person in his stead, should and would give immediate notice thereof to the correspondents or assigns of the said freighter at *Bombay* aforesaid, and should make a right and true delivery of the whole of the said outward goods, excepting such goods, if any, as should have been shipped by the agents of the said freighter at the *Cape of Good Hope* for *Bombay* and *London*, as thereafter provided for, freight free, and agreeably to bills of lading which should have been signed for the same; and that, having completed such delivery, the said commander, or some other proper person as aforesaid, should and would receive and take on board the said ship such a quantity of cotton and other lawful goods, both or either, together with a sufficient quantity of goods to fill up the broken stowage, and no more, as would not exceed in the whole, including any goods shipped at the *Cape of Good Hope* for *Bombay* and *London*, if any should have been so laden, what the said vessel could reasonably stow and carry in the lower hold,

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the space occupied by the fifteen childrons of coals on the outward voyage being again reserved on the homeward bound voyage, estimating the said space as equal to thirty-six pipes of wine or eighteen tons of measurement goods, together with the cabins and between decks, for the benefit of the said owner; and that, having received the said goods on board, and completed the loading of the between decks, the said commander, or some other proper person as aforesaid, should and would, wind and weather permitting, set sail and proceed with the said vessel to the *Cape of Good Hope*, and thence to *London*, or direct to *London*, as the case might be; and, having arrived at *London*, the said commander, or some other proper person as aforesaid, should and would make a right and true delivery of the said homeward cargo in the *West India* or *London Docks*, as directed by the said freighter, agreeably to bills of lading which should have been signed for the same, and there end the said intended voyage; the acts of God, the King's enemies, restraints of princes and rulers, fire, and all and every other the dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, excepted: and the said owner did thereby further agree with and to the said freighter, his executors, administrators, and assigns, that the said ship should be in the port of *London* aforesaid, for receiving the said outward cargo, until the 20th *May* then next ensuing, if required by the said freighter, and at *Bombay*, for delivering the said outward goods and receiving on board the said homeward cargo, and at the *Cape of Good Hope*, in case the said ship should call there on her homeward voyage, for the purpose of the said freighter, as thereafter provided, for the space of fifty running days in the whole, if not sooner dispatched, such lay days to commence and be accounted from the days on which the said ship should respectively be ready to discharge the said goods at *Bombay* and the *Cape of Good Hope* aforesaid,

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and notice thereof should be given as aforesaid: and the said owner also agreed to provide sufficient ballast for the said ship at *Bombay*, in case the correspondents of the said freighter should not provide any or sufficient heavy or dead weight goods for that purpose; and also, that the said ship should be addressed to the correspondents of the said freighter at *Bombay* aforesaid, who were to be allowed the usual commission upon all freight or passengers procured by them for the benefit of the said owner in the between decks and cabins: In consideration whereof, and of every thing thereinbefore mentioned, the said freighter did thereby, for himself, his executors, administrators, and assigns, promise and agree with and to the said owner, his executors, administrators, and assigns, that he, the said freighter, his executors, administrators, correspondents, or assigns, some or one of them, should and would, at his and their own costs, expense, and risk, send alongside the said ship in the aforesaid port of *London*, such quantity of lawful goods as he might think fit to load, not exceeding as aforesaid, in sufficient time to enable the said ship to clear outwards at that port on or before the 20th *May* then next ensuing, and receive the same from alongside the said ship at *Bombay* as aforesaid, and, at their or his like costs, expenses, and risk, send alongside the said ship at *Bombay* as aforesaid such quantity of cotton and other lawful goods, both or either, as should be sufficient to load the lower hold of the said vessel, together with a sufficient quantity of goods to fill up the broken stowage, and no more (the space occupied therein by the fifteen chaldrons of coals on the outward voyage, estimating the said space as equal to thirty-six pipes of wine, or eighteen tons of measurement goods, being again reserved on the homeward voyage for the benefit of the said owner as aforesaid), and dispatch her therewith to *London* or to the *Cape of Good Hope* and *London*, within the days thereinbefore limited for those purposes, or days of demurrage therein-

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after granted; and in like manner receive the said homeward cargo in the port of *London* with all possible dispatch; and should and would well and truly pay or cause to be paid unto the said owner, his executors, administrators, and assigns, in full for the freight of the lower hold of the said ship for the said voyage out and home, and including the freight of all goods discharged and re-laden at the *Cape of Good Hope* as therein stipulated, at and after the rate of 7*l.* sterling money of *Great Britain* per ton for each and every ton stowed in the lower hold when the ship was dispatched from *Bombay*, or by the said charterparty engaged to be provided for stowing therein (always excepting the freight of the space reserved for stowage of thirty-six pipes of wine or eighteen tons of measurement goods for owner's account), such freight to be paid as follows—300*l.*, part thereof, deducting two months' interest at the rate of 5*l.* per cent. per annum, in cash, in *London*, to be paid on the day on which the said vessel should clear outwards at the aforesaid port of *London*; 350*l.*, further part thereof, by the acceptance of the said freighter at two months' date from the same day; and the remainder on a right and true discharge of the said goods, by a good and approved bill payable in *London* at two months' date from the day on which the said ship should report inwards at the Custom House, *London*, after deducting such monies as might have been advanced to the commander of the said vessel by the correspondents of the said freighter at *Bombay* aforesaid, together with the premium of insurance to be effected by the said freighter on freight to the amount of such last-mentioned advance.

The plaintiff then averred, that, the said ship being tight, staunch, and strong, and every way properly victualled and manned as was usual for vessels in the merchant-service, and for the voyage in the said charterparty named, the plaintiff, as commander of the said ship, did afterwards, to wit, on &c., at &c., take on board the said ship in the *West India Docks*, in the said port of *London*,

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such quantity of lawful merchandize as the defendant thought proper to ship in the lower hold; and, having received the same on board, the said ship was afterwards, to wit, on &c., at &c., dispatched therewith; and the plaintiff then and there set sail and proceeded with the said vessel, with the said goods so on board thereof as aforesaid, to *Madeira* and the *Cape of Good Hope*, &c., and afterwards, to wit, on &c., at &c., arrived at *Madeira* and the *Cape of Good Hope*, and then and there discharged and disembarked all the goods and passengers destined for those ports, to wit, at &c., and did afterwards, to wit, on &c., at &c., proceed with all convenient speed to *Bombay*, and did afterwards, to wit, on &c., at &c., arrive at *Bombay* aforesaid; and the said ship was then and there addressed to the correspondents of the said freighter at *Bombay* aforesaid, and the said plaintiff was then and there ready to discharge the said goods from the said ship, and did then and there give immediate notice thereof to the correspondents and assigns of the said defendant at *Bombay* aforesaid, to wit, at &c., and did then and there make a right and true delivery of the whole of the said outward bound goods, except such goods as were shipped by the agents of the said defendant at the *Cape of Good Hope* for *Bombay* and *London*, freight free, and agreeably to bills of lading which had been signed for the same, according to the terms of the said charterparty, to wit, at &c.; and, having completed such delivery, the plaintiff was then and there ready to receive and take on board in the lower hold of the said ship at *Bombay* aforesaid, from the said freighter, his correspondents or assigns, all such quantity of cotton or other lawful goods, both or either, together with a sufficient quantity of goods to fill up the broken stowage, as the said freighter, his correspondents or assigns at *Bombay* aforesaid, should think fit to ship and load on board the said ship; of all which said several premises the defendant afterwards, to wit, on &c.,

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at &c., had notice; yet the defendant, not regarding his said promise and undertaking, but contriving and fraudulently intending to deceive and defraud the said plaintiff in that behalf, did not nor would, within the said lay days or days of demurrage in the said charterparty mentioned, or either of them, nor did nor would any other person or persons on his behalf, at his or their costs, expense, and risk, send alongside the said ship at *Bombay* aforesaid such a quantity of cotton or other lawful goods, together with a sufficient quantity of goods to fill up the broken stowage, as would have been sufficient to have loaded the lower hold of the said ship, excepting the space so reserved for the benefit of the owner and commander as aforesaid, or any quantity of cotton or other goods, or any goods for broken stowage whatsoever, but wholly neglected and refused so to do, and otherwise wholly failed and made default, to wit, at &c.: By means of which said several premises, the plaintiff not only lost and was deprived of all the profit and advantage which he might and otherwise would have made by the freight and primage of the said homeward bound cargo, amounting to a large sum of money, to wit, the sum of 3,000*l.*, but was also put to great charges and expenses in and about endeavouring to procure and procuring another freight for his said ship for her homeward voyage, amounting to a further large sum of money, to wit, the sum of 500*l.*; and also, by reason of the premises, the said ship or vessel of the plaintiff was kept and detained at *Bombay* aforesaid divers, to wit, fifty days longer than she otherwise would have been detained at *Bombay* aforesaid; whereby the plaintiff was not only hindered and prevented from taking divers, to wit, fifty passengers in the said cabins and between decks in the said homeward voyage, which he might and otherwise would have taken, and thereby lost and was deprived of divers great gains and profits which he might and otherwise would have made thereby, amounting to a further

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large sum of money, to wit, the further sum of 1,000*l.*, but was also forced and obliged to pay, lay out, and expend a large sum of money, to wit, the sum of 200*l.*, in and about maintaining, provisioning, and paying the crew of the said ship during the said fifty days, to wit, at &c.

The defendant pleaded the general issue.

The cause was tried before Lord Chief Justice *Tindal*, at the Sittings in *London* after *Trinity Term*, 1830, when the facts appeared as follow:—The *Edward Lombe* sailed from *London* on the 20th *May*, 1828, for *Bombay*, and arrived on the 28th *September* following at the *Cape of Good Hope*, where she remained until the 8th *October*, the master being occupied in taking in cattle and mules on his own account for the *Mauritius*; the defendant's agents at the *Cape* protesting against this delay, and against the ship's going to the *Mauritius*, which they insisted was out of her proper course. The captain, however, proceeded to the *Mauritius*, arrived there on the 10th *November*, and sailed for *Bombay* on the 19th, arriving at *Bombay* on the 19th *January*, 1829, which was about seven weeks later than the vessel would have arrived had she sailed direct from the *Cape* to *Bombay*. Several vessels which left *London* after the departure of the *Edward Lombe* having arrived at *Bombay* a considerable time before her, the defendant's agents there, on account of the delay, refused to load her with a home cargo. The master, after waiting some time at *Bombay*, took in goods there and at *Ceylon* on his own account, and returned home. The action was brought to recover the difference between the freight earned in this homeward voyage, and that which the ship would have earned had the defendant loaded her with a full cargo at *Bombay*, pursuant to the charterparty. The freight of the outward cargo had been paid.

On the part of the defendant, it was contended that the delay unnecessarily occasioned by the master in proceeding to *Bombay*, put an end to the contract. On the other

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hand, it was insisted, that, although a delay (wilful and unnecessary) might subject the owner to a cross-action, still it did not avoid the contract altogether.

His lordship left it to the jury to say whether the delay of the master in proceeding to *Bombay* was of such a nature as to be reasonably supposed to frustrate the whole object of the freighter in chartering the ship: and he told them, that, as the freighter might sue the owner for any ordinary or partial deviation or breach of contract, such deviation did not necessarily put an end to the whole contract; but that, if the deviation were of such a nature as before described, the contract might be considered at an end.

The jury returned a verdict for the defendant.

Mr. Serjeant *Taddy*, in *Michaelmas* Term last, obtained a rule *nisi* that this verdict might be set aside, and a new trial had.—The defendant's only and proper remedy for any supposed deviation was by a cross-action: the entire contract was not abrogated. In *Bornmans v. Thake* (a), by a charterparty between the plaintiff, the captain of a ship, and the defendant's agent abroad, for the carriage of timber from *Riga* to *Portsmouth* at a stipulated rate *per* load, the former bound himself, after receiving his cargo on board, to sail with the first favourable wind direct to the port of *Portsmouth*. The ship, however, unnecessarily entered the harbour of *Copenhagen*, where she was detained several weeks; by means whereof the defendant was put to considerable expense in having fresh insurances done upon the cargo. In an action of *indebitatus assumpsit* for the freight, it was held that the plaintiff's covenant to sail direct to *Portsmouth*, was not a condition precedent, and that the deviation could not be given in evidence either as a bar to the ac-

(a) 1 Camp. 377.

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tion or to diminish the damages. In *Havelock v. Geddes* (a) it was held that a covenant in a charterparty of affreightment, that the owner should at his expense forthwith make the ship tight and strong, &c., for a voyage of twelve months, and keep her so, was not a condition precedent to the recovery of freight after the freighter had taken the ship into his service, and used her for a certain period; but that, if the freighter were afterwards delayed or injured by the necessity of repairing her, he had his remedy in damages: though, if the owner's neglect to repair in the first instance had precluded the freighter from making use of the vessel, that would have gone to the whole consideration, and might have been insisted on as a bar to the action. In *Davidson v. Guyano* (b), where the master of a vessel covenanted with the freighter (*inter alia*) that the vessel should proceed with the first convoy from *England*, for *Spain* and *Portugal*, or either, as he should be directed by the freighter or his agents, and there make a right and true delivery of the cargo agreeably to the bills of lading signed for the same; and so to take in a home cargo, and return and make a right and true delivery thereof at *London*, &c.; in consideration whereof, and of every thing above mentioned, the freighter covenanted (*inter alia*) to load the vessel out and home, and pay certain freight *per ton per month*, part before, and the remainder on the right and true delivery of the homeward cargo at *London*—it was held that the master, having proceeded with the outward cargo to *Lisbon* under the first order, and brought home a return cargo, and delivered the same to the freighter at *London*, was entitled to his freight for that voyage, though he had not sailed with the first convoy—the sailing with the first convoy not being a condition precedent to his recovering freight for the voyage actu-

(a) 10 East, 555.

(b) 12 East, 381.

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ally performed under the first order, but a distinct covenant, for the breach of which he was liable in damages.

Upon all the authorities it is clear that, unless the breach on the part of the plaintiff goes to the whole of the consideration for the defendant's contract, the latter is not at liberty to say that the contract is rescinded.

Mr. Serjeant *Wilde* and Mr. Serjeant *Bompas*, in *Hilary Term* last, shewed cause.—By the terms of the charterparty, the plaintiff covenanted that the ship should sail with all convenient speed from the *Cape of Good Hope* to *Bombay*. The jury have by their verdict found that the delay in proceeding to *Bombay* was such as to defeat the whole object of the freighter in entering into the contract. The course of the voyage having been altered by the master, it was competent to the agents of the defendant to declare their election to put an end to the contract. The ship's proceeding to *Bombay with all convenient speed*, was a condition precedent to the obligation on the part of the defendant to load her with a return cargo; and even if the words "with all convenient speed" had been omitted, the plaintiff would still have been bound to proceed within a reasonable time. In *Soames v. Lonergan* (a), where, in a charterparty on the ship *St. P.*, for a voyage from *Guayaquil* to bring home a cargo to *Europe*, it was provided, that, in the event of the non-arrival at the same port of another ship called the *G.* (which had been chartered by the same parties, and was then at sea), then the charter on the latter ship should be void to all intents and purposes whatsoever—it was held that the word "non-arrival" could not be construed so as to defeat the purposes of the voyage for which the *G.* had been chartered, and her non-arrival for these purposes not being attribut-

(a) 4 Dow. & Ryl. 74; S. C. 2 Barn. & Cress. 564.

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able to the fault of the charterers, the charter on the *St. P.* became void, and the charterers were not bound to provide her with a homeward cargo. In *Touteng v. Hubbard* (a), where a *British* merchant chartered a *Swedish* ship on a voyage to *St. Michael's* for a cargo of fruit, and the charterparty contained the usual exception against the restraint of princes, the ship having been prevented from reaching *St. Michael's* within the fruit season by an embargo laid on *Swedish* vessels by the *British* government, it was held that the *Swedish* owner could not, by proceeding on the voyage after the embargo was taken off, entitle himself to recover the freight against the *British* merchant. Lord Chief Justice *Alcock* there said: "All the cases admit, that, where a party has been disabled from performing his contract by his own default, it is not competent to him to allege the circumstances by which he was prevented as an excuse for his omission. May not the loss which the present plaintiff has sustained be considered, in a political point of view, as arising from his own default? He undertook to proceed with all convenient speed; and if he had loitered it would have been an answer to the action." In *Shadforth v. Higgin* (b), where a ship was freighted to go in ballast to *Jamaica*, and bring home a cargo from thence, and the freighter undertook to provide a full cargo for her in time for the *July* convoy, provided she arrived out and was ready by the 25th of *June*—it was held, that, as she did not arrive out until after the 25th of *June*, the freighter was entirely discharged from his contract to furnish a cargo. In *Bornmann v. Tooke*, the defendant accepted the cargo, and had all the benefit of the performance of the contract on the part of the plaintiff. In *The Duke of St. Albans v. Shore* (c), it was held, that, where, in articles of agreement under a penalty, there are mutual covenants between *A.* and *B.* to do certain acts,

(a) 3 Bos. & Pul. 291.

(b) 3 Camp. 383.

(c) 1 H. Blac. 270.

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and also a covenant which goes to the whole consideration on each side, to an action of debt for the penalty brought by *A.* against *B.* on account of the non-performance of his part, *B.* may plead in bar a breach by *A.* of the covenant which goes to the whole consideration; but, where there are mutual covenants which do not go to the whole consideration, the breach of one cannot be pleaded in bar to an action for a breach of the other—*Boone v. Eyre* (a). In this latter case, however, the contract was in part executed. Here, there was a total failure in the principal object of the contract. In *Havelock v. Geddes*, the charterer permitted the ship to remain twelve months in his employ; he therefore waived his right to insist on the condition precedent as to seaworthiness. So, in *Davidson v. Gwynne*, the condition precedent was waived by the defendant's receiving the benefit of the contract after the breach.

Where there are mutual dependent covenants, the plaintiff must shew performance on his part, to entitle him to recover damages for a breach on the part of the defendant—*Thomas v. Cadwallader* (b), *Goodisson v. Nunn* (c), *Porter v. Shepherd* (d), *Campbell v. Jones* (e), *Cook v. Jennings* (f), *Glaxebrooke v. Woodrow* (g): though it is otherwise where the covenants are independent and distinct—*Storer v. Gordon* (h), *Fothergill v. Walton* (i). In *Ritchie v. Atkinson* (k), Lord *Ellenborough* says: "If the delivery of a complete cargo were a condition precedent to the recovery of any freight, no doubt the defendant would be entitled to require the strictest performance of it: but the question is, whether it be a condition precedent; and that depends, not on any formal arrangement of the words, but on the reason and sense of the thing, as

(a) 1 H. Blac. 273, n.; S. C. nom. *Bone v. Eyre*, 2 Sir W. Blac. 1312.

(b) Willes, 496.

(c) 4 Term Rep. 761.

(d) 6 Term Rep. 665.

(e) 6 Term Rep. 570.

(f) 7 Term Rep. 381.

(g) 8 Term Rep. 366.

(h) 3 Mau. & Selw. 308.

(i) 8 Taunt. 576.

(k) 10 East, 306.

it is to be collected from the whole contract: whether, of two things reciprocally stipulated to be done, the performance of the one does in sense and reason depend upon the performance of the other."

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Mr. Serjeant *Taddy*, in support of his rule—The direction to the jury was improper, and the verdict unauthorized by the facts proved. It did not appear that any loss of market could have been caused to the defendant by the trifling delay which took place; neither was there any proof that any cargo had ever been provided for the ship at *Bombay*. The defendant has received some benefit from the contract: the outward cargo was carried for him, and delivered, part at the *Cape*, and part at *Bombay*. In the cases cited on the other side, no benefit had resulted to the freighter at the outset, as here; the ships went out in ballast. The only safe rule is that laid down in the case of *Boone v. Eyre*—that, where there are mutual covenants which do not go to the whole consideration, the breach of one covenant cannot be pleaded in bar to an action for a breach of the other. In *Havelock v. Geddes*, Lord *Ellenborough* said: "Had the plaintiff's neglect precluded the defendants from making *any* use of the vessel, it would have gone to the whole consideration, and might have been insisted upon as an entire bar; but, as the defendants have had *some* use of the vessel, notwithstanding the plaintiff's neglect, the plaintiff's covenant is to be considered as going to a part only: the consideration has not wholly failed, and the covenant cannot be looked upon as having raised a condition precedent, but merely gives the defendants a right under a counter action to such damages as they can prove they have sustained from such neglect." In the present case, the ship's going to *Bombay* is only a part of the consideration: the defendant has had the benefit of the voyage out; and therefore it cannot be said that there has been a total failure of the consideration. In

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Campbell v. Jones, in an agreement between the plaintiff (the proprietor of a patent) and the defendant, after reciting that it had been agreed between them that the plaintiff should permit the defendant during the continuance of the patent to use it, it was stipulated that the defendant should pay the plaintiff 500*l.*, and that the latter should teach the former the use of the patent—it was held, that, as the consideration on the part of the plaintiff was twofold, *viz.* the transferring to the defendant a right to exercise the patent, and the instructing him, and as the principal part, *viz.* the right to use the patent, had been executed, the plaintiff might sue for the 500*l.* without averring that he had instructed the defendant. The rule is laid down very distinctly and accurately by Mr. Serjeant *Williams*, in a note to the case of *Pordage v. Cole* (a)—“Where a covenant goes only to *part* of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant, without averring performance in the declaration.” In *Fothergill v. Walton* (which was decided on the authority of *Storer v. Gordon*), the owner of a ship covenanted by charterparty with the freighters, to take on board six pipes of brandy at *Havre*, and proceed therewith to *Terciera*, where the master was to take on board a full and complete cargo of fruit or other goods, as the freighters might think fit to send alongside, and dispatch her therewith to *London*; and the freighters covenanted to pay freight for the fruit at certain terms therein specified, and on the brandy at a certain rate therein also stipulated, and guarantied the ship a complete cargo of fruit home. In covenant by the owner against the freighters for not putting a full cargo of fruit on board at *Terciera*, he averred a *general* performance of the covenants contained in

(a) 1 Wms. Saund. 320 c.

the charterparty on his part to be fulfilled; and it was held to be sufficient, as the covenant by the owner to take the brandy from *Havre* to *Terciera* was an independent and distinct covenant, and not to be considered as a condition precedent, as it went only to a *part* of the consideration for the contract. Lord Chief Justice *Dallas* in his judgment in that case, relied on the doctrine established by *Boone v. Eyre*, which he said had been recognised by Lord *Kenyon* in *Campbell v. Jones*, and by Lord *Ellenborough* in *Havelock v. Gaddes*. So, here the covenant on the part of the plaintiff, that the ship should go to *Bombay*, was only a part of the consideration for the contract: and the mere circumstance of a slight deviation from the accustomed course of the voyage out, or the fact of the ship's arrival at the destined port later than was contemplated, can afford the defendant no ground for putting an end to the entire contract; there being no proof of his being at all prejudiced by the delay, nor any evidence that he had a cargo of cotton ready for shipment at *Bombay* at the time when the vessel ought in the ordinary course of events to have reached that port.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court as follows:—

This was an action of *assumpsit* upon a charter by the plaintiff to the defendant, of the ship *Edward Lombe*, from *London* to *Madeira* and the *Cape of Good Hope*, and thence to *Bombay* and back; the plaintiff claiming a compensation in damages against the defendant, for not loading the ship with a cargo of cotton at *Bombay*. At the trial, it appeared in evidence, that, instead of proceeding by the direct and usual course from the *Cape of Good Hope* to *Bombay*, the captain made a deviation to the island of *Mauritius*, and that the defendant's agents at *Bombay*, in consequence of such deviation, refused to find a cargo.

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The point left to the jury was, whether the deviation was of such a nature as to deprive the freighter of the benefit of the contract into which he had entered; the jury being told, that, if such was their opinion, the defendant was excused, by the act of the plaintiff's captain, from furnishing a cargo. The jury having determined that question in the affirmative, and found a verdict for the defendant, a motion was made to set aside the verdict, and for a new trial, on the ground of misdirection. But, after hearing the arguments against and in support of the rule, we are of opinion, that, upon the same principle as that which was laid down in the case of *Mount v. Larkins* (a), and which we think it is unnecessary to repeat, the direction was right; and we therefore think the rule for a new trial must be—

Discharged (b).

(a) *Ante*, p. 165; also reported in 8 Bing. 108.

(b) See *Gibbon v. Mendez*, 2 Barn. & Ald. 17, where, by a charterparty, the freighter covenanted to pay to the owner freight at and after the rate of so much *per ton per month*, for the term of six months at the least, and so in proportion for less than a month, or for such further time than six months as the ship might be detained in the service of the freighter, until her final discharge, or until the day of her being lost, captured, or last seen or heard of; such freight to be paid to the commander of the ship in the manner

following, *viz.* so much as might be earned at the time of the arrival of the ship at her first destined port abroad, to be paid within ten days next after her arrival there, and the remainder of the freight at specified periods—it was held that this constituted one entire covenant, and that the arrival of the ship at her first destined port abroad was a condition precedent to the owner's right to recover any freight, and that the ship having been lost on her outward voyage, the owner was not entitled to recover freight at so much *per ton per month* to the day of the loss.

In the Exchequer Chamber.

MICHAELMAS TERM, 2 WILL. IV.

MILLER v. GREEN.

[In Error.]

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Friday,
Nov. 25th.

THIS was an action of replevin by the defendant in error (the plaintiff below) for taking cattle, goods, and chattels, and standing crops.

The defendant below made cognizance, as bailiff of one *William Hodgson*—That one *John Taylor*, theretofore, and before the said time when &c., was seised of and in the said premises, with the appurtenances, in the declaration mentioned, and in which &c., in his demesne as of fee, and, being so seised, before the said time when &c., to wit, on the 10th *July*, 1797, at &c., duly made and published his last will and testament in writing, bearing date the day and year last aforesaid, and signed by the said

Replevin for taking the goods and growing crops of the plaintiff below. Cognizance, that *G. T.*, being seised for life, by an indenture dated *September*, 1806, granted to *W. H.* an annuity of 166*l.* 2*s.* out of the premises in which &c., for the term of ninety-nine years, if *G. T.* should so long live, with a

clause, that, if the same should be in arrear for twenty-one days, it should be lawful for *W. H.* to enter on the premises and distrain for the arrears, "and the distresses there found to detain, manage, sell, and dispose of in the same manner in all respects as distresses for rents reserved upon leases for years might, were, and ought to be detained, managed, sold, and disposed of, and as if the said annuity was a rent reserved upon a lease for years"—and justifying the taking as a distress for arrears. Plea, that, before the making of the indenture mentioned in the cognizance, viz. in *May*, 1806, the said *G. T.*, by another indenture, in consideration of 3,000*l.*, granted to *W.* an annuity of 413*l.* 12*s.* out of the said premises in which &c., for ninety-nine years; and, for the better securing the said annuity, for the considerations in the indenture mentioned, and of 10*s.* paid to *G. T.* by *F.*, *G. T.* granted, bargained, sold, and demised to *F.* the said premises in which &c., for ninety-nine years:—Held—first, that this plea was no bar to the cognizance, there being no allegation of an entry under the deed by *F.*, or by any claiming under him, nor any election by *F.* that the deed should enure by way of bargain and sale—secondly, that the power of distress in the grant of *September*, 1806, did not extend to growing crops.

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John Taylor, and attested and subscribed in the presence of the said *John Taylor* by three credible witnesses, according to the form of the statute in such case made and provided; and thereby, amongst other things, gave and devised the said premises in which &c., with the appurtenances, unto *Charles Haddock* and *George Bythsea*, their heirs and assigns, to hold the same and every part thereof, with the appurtenances, unto the said *Charles Haddock* and *George Bythsea*, their heirs and assigns, to the several uses, upon the several trusts, and to and for the several ends, intents, and purposes in the said will mentioned, expressed, and declared of and concerning the same; that is to say, subject to and charged and chargeable with the payment of the several annuities and legacies thereafter by him given, and to the powers and remedies therein contained for securing the same, to the use and behoof of *George Taylor* and his assigns, for and during the term of his natural life: that the said *John Taylor* afterwards, and before the said time when &c., to wit, on &c., died so seised of the said premises in which &c., with the appurtenances as aforesaid, without altering his said will as to his said devise of the said premises, with the appurtenances; whereupon and whereby the said *George Taylor* then and there became and was seised of the said premises in which &c. for his natural life, and, being so seised, afterwards, and before the said time when &c., to wit, on the 25th September, 1806, at &c., by a certain indenture then and there made between the said *George Taylor* of the first part, *William Hodgson* of the second part, and one *Thomas Crosse* of the third part, which said indenture, sealed with the seal of the said *George Taylor*, the defendant below brought into Court, the date whereof was the day and year last aforesaid, he, the said *George Taylor*, for the consideration therein mentioned, did give, grant, and confirm unto the said *William Hodgson*, his executors, administrators, and as-

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signs, one annuity or clear yearly sum of 166*l.* 2*s.* of lawful money of *Great Britain*, to be charged and chargeable upon, and issuing, payable, had and received, and taken from and out of the said premises in which &c., and in the said indenture more particularly described, and from and out of every part and parcel of the same, with their and every of their appurtenances—to have, hold, receive, take, and enjoy the said annuity or yearly sum of 166*l.* 2*s.*, and every part thereof, unto the said *William Hodgson*, his executors, administrators, and assigns, thenceforth for and during the term of ninety-nine years, if the said *George Taylor* should so long live; the said annuity or yearly sum of 166*l.* 2*s.* to be payable and paid to the said *William Hodgson*, his executors, administrators, or assigns, upon the 25th *December*, the 25th *March*, the 25th *June*, and the 25th *September* in every year, for and during the said term of ninety-nine years, determinable as aforesaid, without any deduction or abatement whatsoever out of the same or any part thereof: And the said *George Taylor* did thereby also grant unto the said *William Hodgson*, his executors, administrators, and assigns, that, from time to time, when and so often as it should happen that the said annuity or yearly sum of 166*l.* 2*s.* thereby granted, or intended so to be, or any part thereof, should be in arrear and unpaid, in the whole or in part, by the space of twenty-one days next over and after any one of the days or times wherein the same was thereinbefore appointed to be paid as aforesaid, then and so often and from time to time it should and might be lawful to and for the said *William Hodgson*, his executors, administrators, and assigns, into and upon the said messuages, lands, or premises, thereby charged and made chargeable with the said annuity or yearly sum of 166*l.* 2*s.*, or into or upon any part thereof, to enter, and distrain for the said annuity or yearly sum, and all arrears thereof; and the distress and distresses then and there

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found to detain, manage, sell, and dispose of in the same manner in all respects as distresses for rents reserved upon leases for years might, were, and ought to be detained, managed, sold, and disposed of, and as if the said annuity or yearly sum of 166*l.* 2*s.* thereby granted was a rent reserved upon a lease for years: to the intent that the said *William Hodgson*, his executors, administrators, or assigns, should and might thereby, therewith, or otherwise, be fully satisfied and paid the said annuity or yearly sum of 166*l.* 2*s.* thereby granted, or intended so to be, and all the arrears thereof, and all costs, charges, and expenses occasioned by the non-payment thereof at the days and times thereinbefore appointed for the payment of the same; as by the said indenture, reference being thereto had, would, among other things, more fully and at large appear: And the defendant in fact said, that, afterwards, and during the life of the said *George Taylor*, to wit, on &c., at &c., a large sum of money, to wit, the sum of 539*l.* 16*s.* 6*d.* of the said annuity or yearly sum, for the space of three years and one quarter of a year, ending on &c., became and was due and in arrear and unpaid from the said *George Taylor* to the said *William Hodgson*, and so continued due and in arrear for the space of twenty-one days next over and after the day and year last aforesaid, and from thence until and at the said time when &c. remained and was wholly unpaid, the said *George Taylor* at the said time when &c., being alive, to wit, at &c.: wherefore he the said defendant, as the bailiff of the said *William Hodgson*, well acknowledged the taking of the said goods and chattels, corn, pulse, and hops, in the declaration mentioned, in the said premises in which &c., and justly &c., as, for, and in the name of a distress for the said annuity or yearly sum so due and in arrear to the said *William Hodgson* as aforesaid, which said annuity or yearly sum still remained due, in arrear, and unpaid; and that he, the defendant, was ready to verify; wherefore &c.

The second cognizance was similar to the first, save that the will of *John Taylor* was not recited therein.

The plaintiff pleaded in bar, that the said *George Taylor*, before the sealing and delivery of the said indenture in the first cognizance mentioned, and before and at the time of making the said indenture thereafter mentioned, to wit, on the 7th *May*, 1806, at &c., being so seised in his demesne as of freehold for the term of his natural life of and in the said premises in the declaration mentioned, theretofore, and before the making of the said indenture in the first cognizance mentioned, to wit, on &c., at &c., by a certain indenture made between the said *George Taylor* of the first part, one *Margaret Walton* the elder, one *James Dempster*, and one *Daniel Watney*, of the second part, one *Jackson Walton* of the third part, and one *George Fletcher* of the fourth part, after reciting as therein mentioned, in pursuance of the agreement therein mentioned, and in consideration of a certain sum of money, to wit, the sum of 3,000*l.*, to the said *George Taylor* paid by the said *Jackson Walton*, as agent, as in the said indenture in that behalf was mentioned, the said *George Taylor* did give, grant, and confirm unto *Jackson Walton*, his executors, administrators, and assigns, one annuity or clear yearly sum of 413*l.* 12*s.* of lawful money of *Great Britain*, to be charged and chargeable upon, and issuing, payable, had, received, and taken from and out of certain premises in the said last indenture mentioned, and, amongst others, from and out of the said premises in which &c. in the declaration mentioned—to have, receive, take, and enjoy the said annuity, and every part thereof, unto the said *Jackson Walton*, his executors, administrators, and assigns, from thenceforth for and during the term of ninety-nine years, if the said *George Taylor* should so long live: in trust, nevertheless, for the said *Margaret Walton* the elder, *Margaret Walton* the younger, *James Dempster*, and *Daniel Watney* respec-

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tively, and their respective executors, administrators, and assigns, as tenants in common, in the shares and proportions in the same indenture mentioned: and, for the better securing the same annuity, for the considerations in the same indenture mentioned, and also in consideration of ten shillings to the said *George Taylor* paid by the said *George Fletcher*, the said *George Taylor*, on the nomination, and by the direction and appointment, and with the privity of the said *Margaret Walton* the elder, *Margaret Walton* the younger, *James Dempster*, and *Daniel Watney*, testified as therein mentioned, *did grant, bargain, sell, and demise* unto the said *George Fletcher*, his executors, administrators, and assigns, certain premises in the said indenture particularly mentioned, and amongst others, the said premises in which &c. in the declaration mentioned, to have and to hold the same unto the said *George Fletcher*, his executors, administrators, and assigns, from the day next before the day of the date of the same indenture, for and during and unto the full end and term of ninety-nine years, if the said *George Taylor* should so long live, without impeachment of waste as far as the said *George Taylor* could grant the privilege; upon the trusts in the said indenture expressed and declared, and amongst others, upon trust, that, in case and when and as often as the said annuity of 413*l.* 12*s.*, or any quarterly payment thereof, should be in arrear or unpaid, in the whole or in part, by the space of thirty days next after any one of the days or times thereinbefore appointed for payment thereof, the said *George Fletcher*, his executors, administrators, or assigns, should, out of the rents and profits of the said hereditaments and premises thereby granted or demised, or otherwise assured, or intended so to be, or by mortgage or sale thereof, or of a competent part thereof, in case there should not be sufficient distresses on the premises, for all or any part of the said term of ninety-nine years, determinable as therein men-

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tioned, or by bringing actions against or making distress upon all and every or any one or more of the then present or future tenants of the said hereditaments and premises, for recovery of the rents in arrear, or by making entries upon the said hereditaments and premises in and by all and every or any one or more of the said ways and means, or by any other lawful and reasonable ways and means whatsoever, levy and raise such arrears of the said annuity of 413*l.* 12*s.* as from time to time should become due and remain unpaid; together with all such damage, costs, charges, and expenses, as the said *Jackson Walton*, his executors, administrators, or assigns, should incur, expend, or be put unto by reason of the non-payment of the said annuity of 413*l.* 12*s.*, or any part thereof, together with the costs, charges, and expenses attending the execution of the said term of ninety-nine years, and the annual or other premiums which should become due and payable for keeping on foot the benefit of any policy or policies of insurance on the said premises thereby demised, or any part thereof, in the sum of 4,000*l.*, from loss or damage by fire, or obtaining any new or other policy or instrument of insurance for the same or the like amount. The plaintiff then averred that the same indenture and the term of ninety-nine years thereby created and granted of and in the said premises in which &c., in the declaration mentioned, at the time of the making of the said indenture in the said cognizance mentioned, and from thence continually until and at the said time when &c., in the said declaration mentioned, and from thence continually hitherto, had been and were in full force and effect: and the plaintiff further said, that, upwards of thirty days before the making of the said distress, and until and at the time of the making of the said distress, there was due and owing under and by virtue of the said indenture of the 7th *May*, 1806, aforesaid, a large sum of money, to

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wit, the sum of 2,000*l.*, which had become and was due for and on account of the said annuity, theretofore, to wit, on the 7th *May*, 1829, due and payable: and that, &c., wherefore, &c.

There was a similar plea to the second cognizance.

To these pleas the defendant demurred generally. The plaintiff joined in demurrer.

Upon argument in the Court of *King's Bench*, judgment was given for the plaintiff below; whereupon the defendant below brought a writ of error, assigning for errors—*First*, that the plaintiff below had not averred in his pleas in bar that *George Fletcher* entered into and upon the premises in which &c., and, inasmuch as the said demise of the said premises in which &c. to the said *George Fletcher* operated as a demise at common law, and as the said *George Fletcher* had not, in pursuance of the said demise, entered into and upon the said premises in which &c., no estate whatsoever passed out of the said *George Taylor* by the said demise to the said *George Fletcher*; therefore the said *George Taylor* had a sufficient estate in the premises in which &c. to grant the said annuity and the power of distress to *William Hodgson* in the manner and form mentioned in the cognizances of the defendant below—*Secondly*, that it did not appear from the pleas in bar, that the demise to *George Fletcher* was followed by the entry of *George Fletcher* into or upon the premises in which &c., or by any other act of the said *George Fletcher*, so as to vest the term thereby granted in him—*Thirdly*, that the plaintiff below did not shew by his pleas in bar that he had any title to or interest in the said premises in which &c., and therefore could not aver that the said *George Taylor* had not a sufficient estate in the said premises in which &c. to grant the annuity and the power of distress to *William Hodgson*—*Fourthly*, that the plaintiff below, being privy in estate to the said *George Taylor*, was estopped from denying the title of the said *George*

Taylor to grant the said annuity and power of distress to the said *William Hodgson*—*Fifthly*, that the plaintiff below did not by his pleas in bar sufficiently traverse or confess and avoid the cognizances of the defendant below.

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The case was argued in the last *Trinity* Term.

Mr. *Erskine*, for the plaintiff in error.—The plaintiff in error had, by virtue of the deed set out in the avowry, a right to distrain, notwithstanding the prior demise to *Fletcher*. If the defendant in error was in under *Fletcher*, the plaintiff in error could have no right to distrain, the title of *Fletcher* being paramount; but, if the defendant in error held under the grantor by a demise subsequent to that mentioned in the cognizance, the distress would be legal. The questions, therefore, are—*first*, whether, on the face of these pleadings, it can be collected under what title the property of the defendant in error was upon these premises—*secondly*, whose duty it was to shew to the Court in whom such property was—*thirdly*, what is the effect of the silence of the record in that respect.

The grantor had such an estate in him at the time of the grant to *Hodgson*, as to give the plaintiff in error a right to distrain against all the world except *Fletcher* and those claiming under him. It is not shewn upon the record that the plaintiff was in under *Fletcher*; and it was incumbent on him to shew that he was. The demise to *Fletcher* was prior to the annuity to *Hodgson*; but, no part of *Taylor's* estate was taken out of him at the time of the grant of the annuity to *Hodgson*. It is admitted upon the pleadings that *Taylor* was at that time seised for life: but it is said that that estate was taken out of him by the demise to *Fletcher*. The demise to *Fletcher* is a demise at common law, and there are words of bargain and sale to create an use upon which the statute might attach. The first question then is, whether the deed is to operate at common

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law, or under the statute of uses. If at common law, then, as *Fletcher* never entered, no part of the estate is taken out of the grantor. The deed might operate either way, according to the intention of the parties, as shewn by the deed itself; or, if the intention be doubtful, at the election of the grantee, or, according to some authorities, where there is no election by the grantee, the deed operates as at common law. The first thing therefore to be looked at is, the intention of the parties. If the intent be doubtful, the grantee has an election. If he makes no election, the deed is to operate as at common law. In *Fox's* case (a), it is laid down, that, "forasmuch as the intention of the parties is the creation of uses (b), if by any clause in the deed it appears that the intention of the parties was to pass it in possession by the common law, then there no use shall be raised:" and in *Roach v. Wadham* (c), where the question was, whether a deed should operate as a conveyance or an appointment, Lord *Ellenborough* said: "This is a conveyance with a double aspect, having words which indicate an intention to pass an interest and to limit an use, and to be taken either as a conveyance or appointment. We will look, therefore, to the deed, and see which is the predominant intention." *Heyward's* case (d), *Dayrell v. Gunter* (e), and *Rolle's Abridgment* (f), are express authorities to shew, that, if the intention be doubtful, the grantee has his election: and *Saunders on Uses* (g), *Gilbert on Uses* (h), and *Wynne v. Griffiths* (i), shew, that, if there be no election, the deed is to operate as at common law. In the present case, there is nothing in the deed to shew that it was intended to operate by the statute; but, on the contrary, it is manifest

(a) 8 Rep. 94 a.

(b) 2 Inst. 272.

(c) 6 East, 289.

(d) 2 Rep. 35 a.

(e) Sir W. Jones, 206.

(f) 2 Roll. Abr. 787, pl. 6.

(g) Page 49.

(h) Page 230.

(i) 5 Barn. & Cress. 923; S. C. 8 Dow. & Ryl. 470.

that it was intended to operate as at common law; because, after the demise to *Fletcher*, there is an enumeration of the trusts upon which he was to take; and, amongst others, a power to bring actions, to make distresses, and to make entries on the premises to levy the arrears of the annuity; and it would seem, that, till the annuity was in arrear, the right of possession was postponed: and in this sense it is taken by the defendant below himself, for, he avers that the annuity was in arrear before and at the time the distress was taken. The averment that the annuity was in arrear shews that the grantee did not elect that the deed should operate by the statute of uses; for, if he had chosen so to take it, he would have received the rents *instantly*, and thus have kept down the annuity. There being no election, the deed would operate as at common law, and the effect of the demise would be to pass to the lessee an immediate interest, but only an interest which he might enlarge into an estate in possession by entry. The estate remained in the lessor until entry by the lessee. *Littleton* says (a): "Tenant for term of years is, where a man letteth lands or tenements to another for term of certain years, after the number of years that is accorded between the lessor and lessee; and when the lessee entereth by force of the lease, then is he tenant for term of years." And Lord *Coke* in commenting upon this passage says (b): "True it is that to many purposes he (the lessee) is not tenant for years until he enter; as, a release made to him is not good to him to increase his estate before entry, but he (the lessor) may release the rent reserved before entry, in respect of the privity." The same doctrine is laid down in *Bacon's Abridgment* (c): until entry, the possession is not severed from the reversion.

There is nothing on this record to shew that the

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(a) Section 58.

(b) Co. Litt. 46. b.

(c) Tit. "Leases," (M.).

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plaintiff below was in under *Fletcher*. There is no averment that *Fletcher* ever entered and took possession; neither is there any averment that the plaintiff below was tenant to *Fletcher*: but, on the contrary, the averment of the annuity being in arrear shews that he was not in under *Fletcher*; and the subsequent grant of the power of distress to *Hodgson* assumes that *Fletcher* had never entered. In the case of *Chatfield v. Parker* (a), to an action of trespass for *mesne* profits, the defendant pleaded a judgment in 1822 against *A.*, an *elegit* on inquisition finding that *A.* was seised for life of the premises, and that the sheriff delivered the premises to the defendant. The plaintiff replied, that, in 1820, *A.*, by indenture, bargained and sold the premises to him, and that he entered and continued in possession until &c. Upon *oyer* of the deed, it appeared that *A.*, in 1819, conveyed the premises to one *Dawes* for one hundred years, to secure an annuity, and, subject to that, conveyed them to the plaintiff. Mr. Justice *Bayley* said: "It appears by the lease set out on *oyer* that these premises were charged with an annuity, and, for better securing the payment of that annuity, had been conveyed to *Dawes*; the demise to the plaintiff was subject to the right of *Dawes*; but *Dawes* was not bound to enter; and if he did not enter the plaintiff had the right. It is averred in the replication that the plaintiff entered and became possessed, and continued in possession until the trespass was committed. The replication shews that the plaintiff had a right to the land against every person but *Dawes*. The demise to the plaintiff was to commence the day preceding the date of the indenture; it must be presumed, therefore, that *Dawes* had not entered at that time."

Every allegation must be taken most strongly against the

(a) 8 Barn. & Cress. 543; S. C. 2 Man. & Ryl. 540.

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party pleading it (a); and matter in defeazance of a claim must be alleged by way of answer (b): so, facts within the knowledge of the plaintiff should be pleaded by him, and not by the defendant (c). As, therefore, the defendant in error has shewn no title under *Fletcher*, or that *Fletcher* is in possession, and as the deed operates at common law, such being the intention of the parties, or, if the intention be doubtful, there being no election by the grantee, the defendant below was entitled to distrain. But, even if the deed gave immediate possession by the statute of uses, and it was unnecessary to aver the entry of *Fletcher*, still, as the grantor might give a power of distress against himself, and there is nothing to shew that the grantor is not in possession, it was the duty of the plaintiff below to have shewn what title he had, not under the grantor. This was expressly determined in *Howell v. Bell* (d)—“ In replevin, the defendant avowed for that *W. R.* was seised of the place where &c., in fee, and, being so seised, he granted a rent-charge out thereof to *W. W.* for life; that *W. W.* is dead; and that he the defendant was his executor, and distrained in the place for so much rent in arrear and due to his testator in his life-time; but did not aver that the place where &c. was then in the seisin of the grantor of this rent, or any other person who claimed by, from, or under him; and, upon demurrer to this avowry, Lord Chief Justice *Holt* held that the executor might distrain either on the grantor or any other person who comes in by or through him; and, if the plaintiff is not liable to the dis-

(a) 1 Wms. Saund. 259 l. n. (8).
 Com. Dig. tit. “Pleader,” (C.) pl.
 22—Co. Litt. 303. b.

(b) Com. Dig. tit. “Pleader,”
 (C.), pl. 81.

(c) Com. Dig. tit. “Pleader,”
 (C.), pl. 21, 81—2 Wms. Saund.

62 b—*Casseres v. Bell*, 8 Term
 Rep. 167.

(d) Vin. Abr. tit. “Distress,”
 (D. 2.), pl. 9—2 Salk. 136; S. C.,
nomine Hoole v. Bell, 1 Lord Raym.
 172; Lutw. 1227.

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tress, it is more material for him to shew it in his replication for his own defence." Whatever may be the effect of the deed in the present case, the grantor had power to confer the right of distress against himself and those who might take under him by subsequent demise. In *Comyns's Digest* (a), it is said, that, "if a man makes a lease, and afterwards grants a rent-charge out of the land, the cattle of the lessee are not distrainable, for he claims paramount the charge. But, where a stranger claims under the grantor, after the grant of a rent-charge, his cattle are liable to distress, as cattle of a lessee where the demise was after the grant."

It may be admitted that cattle escaping are not liable to be distrained unless they be *levant* and *couchant*; but that being a fact within the knowledge of the plaintiff below, he should have averred it in defeazance of the defendant's right to distrain. In *Viner's Abridgment* (b) it is said—"In all cases where the land is debtor, the cattle of a stranger are as well liable as those of the owner of the land. So, if a neighbour's cattle escape into land out of which a rent-charge issues, and are *levant* and *couchant*, they are distrainable for the rent-charge, and the owner shall not have them again, unless he pay the arrears."

With respect to the last objection, that the defendant below had no power to distrain growing crops—It is not contended that such a right is conferred upon the grantee of a rent-charge by the statute 11 *Geo. 2*, c. 19; but, by the words of the deed, which give the defendant below the power of distress, his right to distrain is co-extensive with that of a lessor for rent reserved upon a lease for years. The words are—that, "when and as often as the said annuity should be in arrear for twenty-one days after the day of payment, then and so often and from time to time it should be lawful to and for the said *William Hodgson*, his exe-

(a) Tit. "Distress," (B. 2.).

(b) Tit. "Distress," (I.) pl. 53.

cutors, &c., into and upon the said messuages, lands, and premises thereby charged, &c., to enter, and distrain for the said annuity or yearly sum, and all arrears thereof; and the distresses then and there found to detain, manage, sell, and dispose of, in the same manner in all respects as distresses for rents reserved upon leases for years might, were, and ought to be detained, managed, sold, and disposed of, and as if the said annuity or yearly sum of 166*l.* 2*s.* thereby granted was a rent reserved upon a lease for years."

Besides, the defendant in error cannot raise the objection in this form of action; for, if the growing crops be not distrainable, neither can they be the subject of an action of replevin. *Bacon's Abridgment* (a), *Comyns's Digest* (b). The case of *Glover v. Coles* (c) is the only one in which the question as to replevying growing corn when taken as a distress, has ever arisen; and there it was only incidental; it was not necessary to the decision of the case: and the opinion of the Judges by whom the subject was adverted to only goes to this, that, in cases to which the statute 11 *Geo. 2* applies, growing corn may be deemed a chattel. The plaintiff below should therefore have brought trespass for the crops, and replevin for the goods that were repleviable. In *Niblett v. Smith* (d), in replevin for taking the plaintiff's goods and chattels, to wit, a lime kiln, the defendant avowed for rent, and the plaintiff pleaded in bar that the lime-kiln was affixed to the freehold—the Court held the plea in bar to be bad, because it was a departure from the declaration. By the 3rd section of the statute 2 *William and Mary*, c. 5, and the 8th section of the 11 *Geo. 2*, c. 19, power is given to landlords to impound the distresses made by them for rent on the premises of the tenant: but as, previously to the statute 2 *Wil-*

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liam and Mary, c. 5, all goods distrained were required to be *removed* within a reasonable time, and replevin being maintainable only for such goods as were capable of being impounded, growing corn clearly could not be the subject of a replevin.

Mr. Preston, contra.—Growing crops were not distrainable at common law: the right was first given to landlords by the statute 11 *Geo.* 2, c. 19; but that statute does not apply to rent-charges, and therefore the defendant below rests upon the words of the deed. The deed gives a right of distress, that is, a legal distress, and also confers the same power of disposing of and dealing with the distress as if the annuity were a rent reserved upon a lease for years. The law warrants a distress of distrainable articles only. As against himself, the grantor might give a right of distress; but he could not extend it to his assignee or lessee, much less to a stranger.

This is the first time that the main point in dispute has arisen. It is clear that the party had a right to grant both annuities. If he had granted several annuities in succession without creating a term, each annuitant would have the right to distrain; but, the instant a term was created, the grantor was disqualified from charging the possession with a rent-charge, with this qualification, that, if he is in possession, he has power to charge that possession with a right of distress. That proceeds upon the ground of estoppel, and not of right.

It is admitted, that, if the term were perfected by entry, it would be a bar to the distress; but the defendant below should have shewn that the plaintiff was in such a situation as to be affected by estoppel. *Fletcher* may perfect his interest at any time by entry, and, when perfected, his title would have relation to the date of the grant, and he might bring ejectment and recover the *mesne* profits. But it is said, that the plaintiff below has not alleged entry by vir-

the of the term. The plaintiff is not the grantee, neither is he his representative or assignee; he has therefore no right of election for the grantee: but, if there be a term, it is sufficient for his purpose; and he has shewn that a term does exist. The deed contains words of bargain and sale, and it is made for a pecuniary consideration. Can it then be said that it is not treated by the plaintiff as a subsisting term? In ejectment the deed would be a sufficient title without entry.

Upon whom, then, lies the *onus* of shewing whether or not the goods were liable to a distress? The plaintiff below complains of the distress; the defendant sets up a deed, which is met by the plaintiff, who alleges that the grantor had previously granted a term of years to another, who may bring an ejectment, and may also maintain trespass for ~~some~~ profits against the tenant, and which previous grant is an answer to any distress by a subsequent grantee whilst the term is existing. If the distress be allowed, the plaintiff below will be liable to two different demands.

Mr. *Erskine* having been heard in reply—

The Court suggested that an application should be made to the Court of *King's Bench*, to permit the plaintiff below to amend the record, by the insertion of an averment of an entry by *Fletcher* by virtue of the demise. A motion was made for that purpose, but rejected.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court:—

This was an action of replevin for taking certain goods and certain standing crops of *Green*, the plaintiff below, in which action, *Miller*, the defendant below, made cognizance as bailiff of one *William Hodgson*. In his first

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cognizance (which differs from the second only in deducing the title of *George Taylor* from the owner of the fee) he stated that the said *George Taylor*, being seised for life, by an indenture dated the 25th *September*, 1806, granted to the said *William Hodgson* an annuity of 166*l.* 2*s.* out of the premises in which &c. for the term of ninety-nine years, if *George Taylor* should so long live, payable in the manner therein mentioned; with a clause, that, "if the same should be in arrear for twenty-one days, it should be lawful for *William Hodgson* to enter upon the said premises and distrain for the arrears, and the distresses there found to detain, manage, sell, and dispose of in the same manner in all respects as distresses for rents reserved upon leases for years might, were, and ought to be detained, managed, sold, and disposed of, and as if the said annuity was a rent reserved upon a lease for years." The cognizance then stated that arrears of the said annuity for three years and a half, *viz.* the sum of 589*l.* 10*s.*, had become due from *George Taylor*, and had continued so due for more than twenty-one days; and justified the taking and detaining the goods as a distress for such arrears.

To this cognizance the plaintiff below pleaded in bar, that, before the making of the indenture stated in the cognizance, *viz.* on the 7th *May*, 1806, the said *George Taylor*, being seised for the term of his natural life, by another indenture then and there made between himself of the first part, the persons therein mentioned of the second part, one *Jackson Walton* of the third part, and one *George Fletcher* of the fourth part, in consideration of the sum of 3,000*l.* to *George Taylor* paid by *Jackson Walton*, granted to the said *Jackson Walton* an annuity of 413*l.* 12*s.* out of the said premises in which &c. for ninety-nine years, if *George Taylor* should so long live. And, for the better securing the said annuity, for the considerations in the said indenture mentioned, and of ten

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shillings paid to *George Taylor* by *George Fletcher*, the said *George Taylor* granted, bargained, sold, and demised to the said *George Fletcher* the said premises in which &c. for ninety-nine years, if the said *George Taylor* should so long live, upon trust, that, as often as the said last-mentioned annuity of 41*l.* 12*s.*, or any quarterly payment thereof, should be in arrear for thirty days, the said *George Fletcher* should, out of the rents and profits of the said premises, or by mortgage, in case there should not be sufficient distresses, or by making entries, levy such arrears and damages. The plea in bar then proceeds to allege, that the said indenture, "and the term of ninety-nine years thereby granted, were in full force and effect;" and that, upwards of thirty days before the making of the distress, there was due and owing, by virtue of the said indenture of the 7th of *May*, the sum of 2,000*l.* for arrears of the said annuity.

A similar plea in bar was pleaded to the second cognizance. To these pleas in bar there was a general demurrer and joinder; and, after argument, the Court of *King's Bench* gave judgment for the plaintiff below for his damages and costs. Upon this judgment a writ of error has been brought; and, after argument, and time taken to consider, the Court of error is of opinion that the judgment of the Court below ought to be reversed.

The argument in this case has turned upon the legal operation and effect of the demise from *Taylor* to *Fletcher*, contained in the indenture of the 7th *May*, 1806; for, if such demise created a legal estate in *Fletcher*, the grant of the annuity by *Taylor* to *Hodgson* by the subsequent deed of the 25th *September*, 1806, but during the continuance of *Fletcher's* interest, must be altogether inoperative in creating any charge upon the premises. Now, in order to give an estate to *Fletcher*, it is contended by the plaintiff below that the grant must either be considered as a demise at common law, or as a bargain and sale made

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upon a consideration of money, and operating under the statute of uses; in either of which cases the estate vests in *Fletcher*, the grantee.

The first question therefore is, whether the grant can be considered as a lease at common law. The objection taken to it as a lease at common law is this, that it does not appear upon the pleadings that *Fletcher*, the lessee, or any person claiming under him, entered after the lease was granted; and that, unless there is an entry by the lessee, or some one claiming under him, no estate vests in him. And such we consider to be the effect of the authorities. It is laid down by Lord *Coke* (a), "that, to many purposes, the lessee is not tenant until he enters, as a release made to him is not good to him to increase his estate before entry; neither can the lessor grant away the reversion by the name of the reversion before entry." Now, both these consequences depend upon the assumption that the estate has not passed out of the lessor into the lessee before he has by his entry accepted such estate; for, if the estate had actually passed to and vested in him, there can be no reason why a release would not increase such estate, nor, again, why the reversion should not pass by that name. And, in further support of the distinction, Lord *Coke* goes on to say—"But the lessee before entry hath an interest, *interesse termini*, grantable to another:" thus putting in contradistinction the interest and the estate of the lessee. And again, *Littleton* lays down the same doctrine more pointedly (b)—"If the lessor release to the lessee all his right, &c., before that the lessee had entered into the same land by force of the same lease, such release is void; for that the lessee had not possession in the land at the time of the release made, but only a right to have the same land by force of the

(a) Co. Litt. 46. b.

(b) Litt. a. 459.

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lease." See also *Bacon's Abridgment* (a), where the necessity of an entry by the lessee, in order that the estate may vest in him, is put upon the ground that it is an acceptance by him of the estate. Under these authorities, therefore, we think that, as the plaintiff neither alleged an entry by *Fletcher* under the lease, nor shewed any privity between his possession and *Fletcher's* term, nor anything equivalent to an entry, such as an acceptance of the estate by the execution of the lease, no estate passed to *Fletcher* under the lease of the 7th *May*; and, consequently, that the estate remained in the lessor, and that the grant of the annuity, and the power of distress to *Hodgson* by the indenture of the 25th *September*, was a grant capable of taking effect.

But it is contended by the plaintiff below, that, if the grant of the 7th *May* cannot take effect as a lease at common law, at all events it is good to pass the estate to *Fletcher* as a bargain and sale under the operation of the statute of uses.

It is undoubtedly true, that, where a deed may enure to divers purposes, he to whom the deed is made shall have election which way to take it, and may take it in that way as shall be most for his advantage (b); and therefore, if a man for money demises, grants, bargains, and sells to *J. S.* his land for years, *J. S.* has election to take it either by demise at the common law, or by bargain and sale—*Heyward's* case (c): so that *Fletcher* in this case, or any person claiming under *Fletcher*, and in privity with him, might at any time elect to claim under the deed which way they would. But the plaintiff below, who pleads this grant, is, so far as appears upon the record, a stranger to it; and therefore the plaintiff below is not competent to elect for *Fletcher*, whether the grant to him shall operate the one way or the other;

(a) Tit. "Leases," (M.). (b) Sheppard's Touchstone, 83.

(c) 2 Rep. 35 b.

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nor, indeed, does the plaintiff below shew that any election has been made by any one that the deed shall be held to operate under the statute. It is not even stated, as was before observed, that *Fletcher* ever executed the deed, so as to assent to take any estate under it: for anything that appears to the contrary, he is as much a stranger to it as *Green*, the plaintiff below. Under these circumstances, we consider the Court cannot be called upon to exercise an election for the grantee, at the expense of a stranger, for the purpose of defeating a subsequent grant of an annuity for a valuable consideration. The grant therefore must be left to such operation as it will have as a lease at common law, which, we have already seen, will not be sufficient to create an estate in the lessee, for want of an entry; and we therefore think the term of years set up under that grant forms no answer to the cognizance under the subsequent annuity deed.

Although, however, the defendant below had the right to distrain for the arrears of his rent-charge, yet, upon the due consideration of the power of distress contained in the deed, we think it did not extend to the growing and standing crops which have been taken under it. At common law, it is well known, the distresses taken for rent arrear were not saleable, but could only be kept as a pledge for the rent. But, by the statute 2 *William and Mary*, goods and chattels distrained for rent due under a contract may be kept and sold in the manner pointed out by that statute.

It was not until the 11 *Geo. 2*, c. 19, that landlords had power to distrain corn, grain, or other produce growing on the land demised. The grantee of this rent-charge is empowered by the deed to detain, manage, sell, and dispose of the distresses in the same manner in all respects as distresses for rents reserved upon leases for years, and as if the said annuity was a rent reserved upon a lease for years; and we think these words are fully satisfied by

holding them to grant the powers which were given to landlords under the statute of *William and Mary*, without extending them to the new subject of distress first granted by the statute 11 *Geo. 2*, c. 19. A power like the present ought at all times to be construed strictly; and more especially when it is sought to bring within it the growing crops of a person who is a stranger to the deed.

Upon the whole, therefore, we think that the present judgment should be several, and that judgment should be entered for the person making cognizance, for a return of the cattle, goods, and chattels which were taken in distress, and for that part of the distress only; with a judgment for the plaintiff below for damages for taking and detaining the standing crops.

Judgment reversed.

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END OF MICHAELMAS TERM.

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MEMORANDA.

PURSUANT to the statute 1 & 2 *Will.* 4, c. 56, His Majesty issued his letters ~~patent~~, dated the 5th *December*, 1831, constituting a Court, to be called "*A Court of Bankruptcy*;" and appointing The Honourable *Thomas Erskine* Chief Justice, and *Albert Pell*, *John Cross*, and *George Rose*, Esquires, to be Puisne Judges—the Chief Justice to take precedence in rank next to the Puisne Judges of the other Courts, and after him the other Judges.

C. F. Williams, *J. H. Merivale*, *J. Evans*, *R. G. C. Fane*, *E. Holroyd*, and *J. S. M. Fonblanque*, Esquires, were appointed commissioners; and Mr. Serjeant *Edward Lanes* Chief Registrar.

CASES

ARGUED AND DETERMINED

IN THE

Court of Common Pleas.

HILARY TERM, 2 WILL. IV.

1832.

Thursday,
Jan. 12th.

PIRIE v. IRON.

MR. Serjeant *Spankie* moved, on the part of the plaintiff, that the examinations of certain witnesses in this cause might be taken *videlicet* before the Prothonotary, under the provisions of the statute 1 Will. 4, c. 22 (a). He founded his motion upon an affidavit, which stated that the action was brought against the defendant, a pilot, for

The Court granted a rule (absolute unless cause shewn on the morrow), for the examination of witnesses by the Prothonotary, under the statute 1 Will. 4, c. 22, upon an affidavit that they were about to sail immediately for India.

(a) Section 4, by which it is enacted—"That it shall and may be lawful to and for each of the Courts at Westminster, and the several Judges thereof, in every action depending in such Court, upon the application of any of the parties to such suit, to order the examination on oath, upon interrogatories, or otherwise, before the Master or Prothonotary of the said Court, or other person or

persons to be named in such order, of any witnesses within the jurisdiction of the Court where the action shall be depending, or to order a commission to issue for the examination of witnesses on oath at any place or places out of such jurisdiction, by interrogatories or otherwise, and, by the same or any subsequent order or orders, to give all such directions touching the time, place, and man-

1832.

PIRIE
v.
IRON.

running down a vessel belonging to the plaintiff, and that the master and mate of the plaintiff's vessel (the witnesses proposed to be examined) were going to sail for *India* on *Saturday*, the 14th instant.

The Court granted the rule—absolute, unless cause shewn on the morrow.

Saturday,
Jan. 14th.

Mr. Serjeant *Merewether*, on the part of the defendant, now moved that the examination might be deferred, on the ground that the defendant's attorney, who lived at *Dover*, could not, on such short notice, be present at the examination, and his agent here was not sufficiently acquainted with the facts of the case. It was also suggested that there had been unnecessary delay on the part of the plaintiff in the progress of the cause, which, but for such delay, might have been already tried; and that, at all events, the application should have been made earlier, as the plaintiff must have known that the witnesses were about to go abroad.

Mr. Serjeant *Spankie*, for the plaintiff, denied that there had been any delay, or that the plaintiff had before the first day of the present term any knowledge of the fact of the parties being about to sail so soon.

PER CURIAM.—Let the examination and cross-examination go on *de bene esse*; and let the plaintiff produce an affidavit shewing the cause of the delay.

ner of such examination, as well within the jurisdiction of the Court wherein the action shall be depending as without, and all other

matters and circumstances connected with such examinations, as may appear reasonable and just."

1832.

MEREDITH v. DREW.

Friday,
Jan. 13th.

MR. Serjeant *Merewether*, on the part of the defendant, moved for a rule to call upon the plaintiff to shew cause why the proceedings in this cause should not be stayed, upon payment of the debt, without costs, upon an affidavit stating that the action was brought to recover a debt of 7*l.*, and that the defendant, who was an attorney, and had an office in the city of *Bath*, was within the jurisdiction, and liable to be sued in the *Bath* Court of Requests, by virtue of the statute 45 *Geo. 3*, c. lxvii; by sect. 22 of which power is given to any person or persons (whether such person or persons shall reside within the jurisdiction of the said court or not,) having any debt or debts on the balance of account or otherwise howsoever, not exceeding the value of 10*l.*, due, owing, or belonging to him, her, or them, &c., by or from any other person or persons whatsoever, inhabiting, residing, or being within the said city or the liberty or precincts thereof, &c., or keeping or using any house, warehouse, wharf, quay, lodging, shop, shed, stall, or stand, or using or frequenting the markets there, or seeking a livelihood, or in any way trading or dealing within the same, to apply to the clerk of the court, &c., &c." By section 32, attornies are ousted of privilege; and by section 47, it is enacted, "That, if any action or suit for any debt recoverable by virtue of this act in the said Court of Requests shall be commenced in any other court whatsoever, or elsewhere than in the said Court of Requests, then, and in every such case, the plaintiff or plaintiffs in such action or suit shall not, by reason of a verdict for him, her, or them, or otherwise, have or be entitled to any costs whatsoever; and, if the verdict shall be given for the defendant or defendants in such action or suit, and the Judge or Judges before whom the same shall be tried or heard shall think fit to certify that such debt ought to

By the *Bath* Court of Requests act, 45 *Geo. 3*, c. lxvii. s. 22, it is provided, that, if any action for any debt recoverable in the said court shall be commenced in any other court, the plaintiff shall not, by reason of a verdict for him, or otherwise, be entitled to any costs:—*The Court refused, before verdict, to grant a rule to stay the proceedings in a cause so commenced, upon payment of the debt, without costs.*

1832.
 MARRIDGE
 v.
 DREW.

have been recovered in the said Court of Requests, then, and in every such case, such defendant or defendants shall have costs, and such remedy for recovering the same as any defendant or defendants may have for his, her, or their costs in any cases by law."

The learned Serjeant referred to *Demster v. Day* (a), where, under the *London Court of Requests act*, 39 & 40 Geo. 3, c. 104, s. 12, which provides, that, if any action be commenced out of that court for any debt not exceeding 5*l.* (within the jurisdiction), the plaintiff shall not, by reason of a verdict for him, or otherwise, be entitled to costs, &c., it was held, that, after judgment by default, and an assessment of damages upon a writ of inquiry, the defendant might come into Court and move to stay the proceedings on payment of the damages assessed, without costs—*Baildon v. Pitter* (b), where it was held, that, if an action against a person within the jurisdiction of the *Bath Court of Requests* be brought elsewhere, the Court, on motion, will deprive the plaintiff of costs—and *Axon v. Dallimore* (c), where it was held that an action of *assumpsit* for use and occupation is a cause of action within the jurisdiction of the *Bath Court of Requests*; and that a defendant occupying a warehouse, though he does not personally reside in that city, is entitled to be sued within the local jurisdiction for a debt under 10*l.* arising out of the limits thereof. He submitted that the defendant ought to be permitted to stay the proceedings here, on payment of the debt, without costs, as no costs could in law be recovered by the plaintiff; and that, the act being remedial, its construction should be liberal.

Mr. Justice PARK (d).—I think the defendant in this

(a) 8 East, 239.

(b) 3 Barn. & Ald. 210; *S. C.* 1 Chit. Rep. 635.

(c) 3 Dow. & Ry. 51.

(d) The Lord Chief Justice and the other two Judges were absent on the special commissions.

case is not in the same stage of proceeding as is contemplated by the statute, or as the parties were in in the cases cited. In justice, the defendant ought to pay the costs: he is not entitled to any indulgence from the Court.

1832.
MEREDITH
VS
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Mr. Justice ALDERSON.—The statute only applies to a case where there has been a verdict: here the cause has not proceeded so far; therefore I think the motion is premature. The defendant applies to the Court for a favour. It is but just that he should pay the costs. At all events, he is not entitled to the rule prayed.

Rule refused (a).

(a) See the report of the motion in this case *after* verdict, *post*, Vol. 2.

MACARTHY, v. SMITH.

Saturday,
Jan. 14th.

THIS was an action of *assumpsit*. The declaration consisted of counts for goods sold and delivered and the common money counts. The bill of particulars, which was annexed to the record, pursuant to the late rule (a), only mentioned goods sold and delivered.

The rule of *Trinity*, 1 W. 4, which requires the particular of demand to be annexed to the record, dispenses with proof of its delivery.

At the trial before the Lord Chief Justice at the Sittings in *London* after the last term, the defence set up was that the goods were delivered upon condition—sale or return; but it appeared that part of the goods, to the amount of 3*l.* 18*s.*, had been sold by the defendant. In the course of the summing up, an objection was taken, on the part of the defendant, that the bill of particulars made no mention of a demand for money had and received, and therefore that the plaintiff could not be entitled to a ver-

(a) Rule 6, *Trinity*, 1 W. 4—5 Moore & Payne, 815.

1832.

MAGAREY
v.
SMITH.

dict on the money counts. On the part of the plaintiff it was contended that the bill of particulars was not proved, and therefore did not stand in the way.

His Lordship, however, was of opinion that the objection was well founded, and that the annexation of the particular to the record, in pursuance of the rule, dispensed with the necessity of proof of it. The plaintiff was thereupon nonsuited.

Mr. Serjeant ~~Heath~~ now moved that this nonsuit might be set aside and a new trial had, or a verdict entered for 3*l.* 1*s.*—He submitted that the object of the rule was not to dispense with proof of the particulars; and that, at all events, the objection came too late in the cause.

Lord Chief Justice TINDAL.—I do not think that the Court is properly called upon to interfere in this case. The object of the rule in question was to save the parties the expense of proof of the delivery of the bill of particulars to the defendant or his attorney. If we are not at liberty to look at the bill of particulars when appended to the record in the manner pointed out, the entire object of the rule is done away with. Upon the counts for goods sold and delivered the plaintiff was out of Court; he then claimed a right to resort to the money counts. In all probability, if the plaintiff's claim upon the money counts had been presented to the defendant in the particulars, he would not have incurred the expense of defending the action.

Mr. Justice PARK.—The rule in question does not alter the case. The plaintiff was bound by his particulars before the rule was made. The rule only dispenses with the necessity of the formal proof of the delivery of the particulars.

The rest of the Court concurring—

Rule refused.

1832.

Saturday,
Jan. 14th.

GWILT v. CRAWLEY.

THIS was an action on the case against the defendant for knocking down and running over the plaintiff. The cause was on the 6th November, 1831, set down for trial at the sittings at Westminster after Michaelmas Term, and, on the 2nd December, was called on; when, no counsel appearing on the part of the defendant, the plaintiff's case was gone into, and a verdict found for him—damages 50l.

The Court refused to grant a new trial on the ground that the cause had been called on in the absence of the defendant's attorney, and that the plaintiff's case had been gone into, no one appearing on the other side—the affidavits on which the motion was founded not stating that any briefs had been prepared for counsel.

Mr. Serjeant Storks now moved that the verdict and the judgment and writ of *fieri facias* thereon might be set aside, and a new trial had, and that the sum levied under the *fieri facias* might be paid back to the defendant—on an affidavit of the defendant, denying the charge of running over the plaintiff; and an affidavit of the defendant's attorney, that he had instructed his clerk to watch the progress of the cause list; that he did not expect the cause to come on on the day mentioned; that his clerk was inadvertently absent from Court when the defendant's name was called; and that he (deponent) had examined several witnesses on the part of the defendant, who were sufficient to repel the charge.

It appeared; however, that no briefs had been delivered to counsel, or even prepared.

Lord Chief Justice TINDAL.—I am of opinion that the rule prayed ought not to be granted. The defendant's attorney had notice that the cause was set down for trial on the 28th November. It was not called on till the 2nd December. He had therefore ample time to prepare his defence. He ought to have subpoenaed his witnesses and delivered briefs to counsel; but it does not appear that he had done either; neither does he state in his affidavit that he examined the witnesses he mentions before the trial.

1832.

GUILT
v.

CRAWLEY.

All that he seems to have done was, to send a clerk to watch the cause; and the clerk was absent when it was called on. The cause was not taken as undefended; the plaintiff's witnesses were examined, and the jury were satisfied with their evidence. We should be doing gross injustice to the plaintiff to accede to the application.

Mr. Justice PARK concurred.

Mr. Justice ALDERSON.—The defendant's attorney ought to have satisfied the Court that he had taken some steps to try the cause—that he had prepared the briefs, or delivered them to counsel. He has not done so; and therefore I think a new trial ought not to be granted on any terms.

Rule refused.

Tuesday,
Jan. 17th.

DOE *d.* SCRUTON *v.* SNAITH.

A mortgage deed to secure 3,000*l.* and interest, together with all expenses incurred in the execution of the powers of sale, &c., contained in the deed, and interest thereon, does not require a 2*5**l.* stamp.

THIS was an action of ejectment upon a mortgage deed, whereby, in consideration of a sum of 1700*l.* paid by the lessor of the plaintiff to discharge a prior mortgage, and of a further advance of 1300*l.* by him made to the mortgagor, the latter, by a deed of the 6th April, 1829, conveyed the premises in question to the lessor of the plaintiff, in fee. The deed contained a proviso, that, if the mortgagor should pay to the mortgagee the sum of 3,000*l.*, and all such sum or sums of money as he, the mortgagee, should expend or disburse for or in respect of the mortgage, with interest at and after the rate of 4*l.* 10*s.* *per cent. per annum*, on the 6th day of *October* then next, those presents should cease and be void; but that, in default of payment after three months' notice, the mortgagee should

be at liberty to enter and receive the rents and profits of the mortgaged premises, to make leases, and to sell and absolutely dispose of the messuages, &c., to repay himself the mortgage money, together with all disbursements and expenses, and interest: and the mortgagor covenanted to pay the £,000*l.* and interest, and all costs and expenses, with interest.

1832.
 }
 Doe
 d.
 SKEWTON
 v.
 SNAITH.

The cause was tried before Mr. Justice *James Parke*, at the last Summer Assizes for the county of *York*, when it was objected on the part of the defendant, that, inasmuch as the money intended to be secured by the mortgage deed was uncertain in amount; the deed embracing sums *ultra* the principal, *viz.* incidental expenses in the recovery of the money advanced, the stamp (which was 9*l.*) was insufficient—the stamp act, 55 *Geo.* 3, c. 184, Sched. part 1, title "*Mortgage*," imposing a duty of 25*l.* where the total amount of the money secured, or to be ultimately recoverable upon the mortgage, shall be uncertain and without limit.

A verdict was taken for the lessor of the plaintiff, with liberty to the defendant to move to enter a nonsuit, on the above objection.

Mr. Serjeant *Jones* accordingly, in the last term, obtained a rule *nisi*.

[Mr. Justice *Alderson* referred to *Dickson v. Cass* (a).]

Mr. Serjeant *Wilde* now shewed cause.—The sum intended to be secured by the mortgage deed in this case was 3,000*l.* and interest. The nature of the security requires that certain incidental expenses shall be incurred in order to render it available. The advance being for the benefit of the mortgagor, the costs of reinstating the mortgage should be borne by the former. There is therefore

(a) 1 Barn. & Adolph. 343.

1832.

Doct
d.
Sutton
v.
SWAITE.

no uncertainty in the amount of the security; the expenses are merely collateral. In *Prussing v. Ing* (a) it was held that a promissory note for the payment of 30*l.* at three months after date, with interest from the date, only requires a stamp applicable to a note not exceeding 30*l.* Lord Chief Justice *Tenterden* there said: "The object of the legislature was to impose a *pro rata* stamp-duty upon the sum actually due at the time of taking the security, and not upon what might become due in future for the use of that money." *Debbins v. Cass* is distinguishable from the present case. There, a bond was given for 2,000*l.*, the condition of which—after reciting that *A.* and *B.* had opened an account with *D., E., F.,* and *G.*, as bankers, and that the bankers had agreed to discount bills and pay in advance for *A.* and *B.* any sums of money not exceeding 1,000*l.* in the whole—was, that *A., B.,* and *C.* should satisfy and pay the bankers all such sums as they should advance on account of the accepting or paying any bills, &c., together with such lawful charges and allowances for advancing and paying such bills as are usually charged by bankers in such cases, and interest; and the Court held, that, that being a bond to secure, not only 1,000*l.*, but a further sum for the bankers' charges for commission, &c., the stamp of 5*l.* required by the 55 Geo. 3, c. 184, Sched. part 1, title "Bond"—given as a security for the payment of any definitive or certain sum of money—exceeding 500*l.*, but not exceeding 1,000*l.*—was not sufficient. Mr. Justice *Bayley* there says: "The condition was not only to repay the sums which the bankers should have advanced on account of *A.* and *B.,* but such sums, together with such lawful charges and allowances as are usually charged

(a) 4 Barn. & Ald. 204; and see *Peacock v. Murrel*, 2 Stark. Rep. 558. See also *East v. —*, 2 Man. & Ryl. 8, where it was held that a promissory note for 1*l.* 10*s.*

made payable, "on demand, to the bearer, with interest," requires only a two shilling stamp by the 55 Geo. 3, c. 184, Sched. part 1, title "Promissory notes."

1832

DOE
d.
SCRUTON
v.
SHAWLTH.

by bankers in similar cases, with lawful interest for such sums as they should be in advance against A. and B. The bond was to be a security, therefore, not only for the sum of 1,000*l.* actually advanced, but also for such commission as the bankers usually charge on such advances. The sum payable as commission (whatever it may be) must be added to the sum of 1,000*l.*; therefore the stamp, being that required for 1,000*l.*, is too low, because (without reckoning any interest) the party, by the condition of the bond, would be liable to pay, not only the sum of 1,000*l.*, but also a further sum for commission." In that case, the bond was intended to cover the customary remuneration to the bankers for the advances to be made by them. The security was not limited, as here, to the bare sum advanced. If the objection now taken be allowed to prevail, no mortgage will ever be safe unless the deed bears a 2*5**l.* stamp; for, the amount of the expenses that may be incurred in putting in force the powers given by the deed can never be ascertained. Such clearly was not the intention of the legislature. In *Denodon v. Binos* (a), it was held that a bond conditioned for the payment of money and interest, and also for the performance of collateral acts, requires only the *ad valorem* stamp appropriated to the principal sum, where that stamp exceeds the 1*l.* 1*5**s.* which the collateral matter would require if it stood alone.

Mr. Serjeant Jones, in support of his rule:—The stamp in question was not sufficient. The statute provides, that, if the total amount of the money secured, or to be ultimately recoverable upon the mortgage, shall be uncertain and without any limit, the deed shall be stamped with a 2*5**l.* stamp: but that, if the total amount of the money secured, or to be ultimately recoverable thereupon, shall be limited not to exceed a given sum, it shall pay the same

(a) 1 Man. & Ry. 130.

1832.

DOE
d.
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SNAITH.

duty as on a mortgage or wadset for such limited sum. Here, the mortgagee is to be indemnified for possible expenses incident to the security, and the sum to be ultimately recoverable is not limited not to exceed a given sum: therefore the larger stamp was requisite. The statute excepts "any sum or sums of money to be advanced for the insurance of any property comprised in such mortgage or security against damage by fire, or to be advanced for the insurance of any life or lives, pursuant to any agreement in any deed whereby any annuity shall be granted or secured for such life or lives." The exception as to insurance proves the rule. Besides, here, the mortgagee was not only to be refunded the costs he might incur in rendering his security available, but he was to be paid interest on such sums as he might thus advance. In *Pruessing v. Ing*, the interest was necessarily growing out of the principal sum; here it is only incidental. The case therefore falls within the principle laid down in *Dickson v. Cass*. Mr. Justice *James Parke* there said (a): "I yield with great reluctance to the objection taken to the stamp, but I think it is well founded, because the charges (exclusive of interest) would be a sum exceeding the 1,000*l.*; the stamp therefore is not sufficient."

Lord Chief Justice TINDAL.—Upon the proper construction of the statute, I am of opinion that the stamp of 9*l.* used in this case was sufficient. The question arises upon a clause in the schedule of the stamp act, under the title "*Mortgage*." Upon looking at that clause, I think it is obvious that the intention of the legislature was to impose a stamp proportioned to the sum advanced or lent. That was the main object. The words preceding the scale of duties are—"Where the same respectively shall be made as a security for the payment of any *definite*

(a) 1 Barn. & Adolph. 358.

1832.

DOE
 &
 SCRUTTON
 v.
 SMITH.

and certain sum of money advanced or lent at the time, or previously due and owing, or forborne to be paid, being payable"—then follows the scale, in which we find that the duty imposed upon a mortgage made to secure a sum exceeding 4,000*l.*, but not exceeding 5,000*l.*, is 9*l.* Then come these words—"and where the same respectively shall be made as a security for the re-payment of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be, other than and except any sum or sums of money to be advanced for the insurance of any property comprised in such mortgage or security against damage by fire, or to be advanced for the insurance of any life or lives, pursuant to any agreement in any deed whereby any annuity shall be granted or secured for such life or lives—If the total amount of the money secured, or to be ultimately recoverable thereupon, shall be uncertain and without any limit, 25*l.*—But, if the total amount of money secured or to be ultimately recoverable thereupon shall be limited not to exceed a given sum, the same duty as on a mortgage or wadset for such limited sum." These two latter clauses appear to follow the meaning of the former, and to have been intended to cover the sum actually advanced, and of which the borrower has the benefit. Looking at the recital in the deed in this case, the main intention of the parties seems to have been to give to the mortgagee a security for the re-payment of two several sums of 1,700*l.*, and 1,300*l.*—the former sum being given to pay off an old mortgage, and the latter advanced to the mortgagor. The question then is, whether a proviso and subsequent covenant in the deed, to indemnify the mortgagee against any possible expenses that might be incurred by him in recovering the money so advanced, are of necessity to be coupled with the loan. I think not. There is nothing provided for in the deed that could not be enforced

1832.

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d.
SOURTON
v.
SWATTE.

by the mortgagee upon an ordinary mortgage. The practice always has been to allow in the Master's office all expenses properly and necessarily incurred by the mortgagee in getting possession of the property. There is also a similar power in equity, without the assistance of this proviso.

It has been contended that the intention of the legislature that those expenses should be embraced by the stamp, is to be implied from the exception in the clause of the schedule as to money paid for insurance against damage by fire; and the case of *Dickson v. Cass* was supposed to be in point. But, in the first place, the insurance is a different and a larger security concurrent with the deed; and the cost of insuring is not recoverable under the common form of mortgage. *Dickson v. Cass* is, however, clearly distinguishable from the present case. There, a bond was given for 2,000*l.*, the condition of which—after reciting that *A.* and *B.* had opened an account with *D., E., F.,* and *G.,* as bankers, and that the bankers had agreed to discount bills and pay in advance for *A.* and *B.* any sums of money not exceeding 1,000*l.* in the whole—was, that *A., B.,* and *C.* should satisfy and pay the bankers all such sums as they should advance on account of the accepting or paying any bills, &c., together with such lawful charges and allowances for advancing and paying such bills as were usually charged by bankers in such cases, and interest—it was held, that, that being a bond to secure not only 1,000*l.*, but a further sum for the bankers' charges for commission, &c., the stamp of 5*l.* required by the 55 *Geo. 3. c. 184*—Schedule, part 1, title "Bond—given to secure a sum exceeding 500*l., but not exceeding 1,000l.*"—was not sufficient. In the first place, the charge for commission in that case was necessary in order to make the instrument available to the borrower; whereas here the expenses have no relation to the advance of the money, but only to the proceedings that the lender may be compelled to have

reconvert in order to make his security available to himself. In the second place, the charges there were such as the bankers would not have been entitled to on the bond unless specified therein; but here the expenses would be allowed to the mortgagee whether mentioned in the deed or not. All acts that impose a burthen on the subject, must be construed most strictly; and if there be on the face of them any doubt, the subject should have the benefit of that doubt.

1832.

Don
d.
SCURTON
v.
SHUTE,

Mr. Justice PARK.—I am of the same opinion. The mortgage in this case is clearly not within the clause imposing a stamp of 25*l*. "where the total amount of the money secured or ultimately recoverable thereupon shall be uncertain and without any limit." The true question is, whether the expenses in this case would not necessarily follow the powers of leasing and of sale. In equity, they would clearly be considered incidental to the mortgage. The principal sum secured is only 3,000*l*.; the costs of making the security available to the mortgagee necessarily follow the principal sum. I think this case is, for the reasons stated by my Lord Chief Justice, distinguishable from *Dickson v. Carr*; and that *Pruessing v. Ing* is directly in point.

Mr. Justice BOSANQUET.—I am of opinion that the stamp upon this deed was sufficient. The question turns upon the construction of an act of parliament imposing upon the subject a duty or penalty, and we must not impose a greater duty than the legislature intended. The deed in question was made to secure the re-payment of a definite sum advanced to the mortgagor, not a sum uncertain and without limit. With respect to the reservation of interest to be paid upon the sum advanced, the case of *Pruessing v. Ing* is a decisive authority that such reservation does not affect the stamp: and, as to expenses—does the stipu-

1832.

Dox
d.
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v.
SNAITH.

lation in this deed, that the mortgagee shall recover his expenses, operate as an extension of the sum secured? The case of *Dickson v. Cass*, which has been referred to, is distinguishable. There, the expenses secured by the bond were expenses attending the advance of the money; whilst here, the expenses stipulated for were merely those attending the recovery of the sums advanced; and it was not necessary that they should have been mentioned at all. I am therefore of opinion that this security falls within the latter branch of the clause in the schedule of the act, imposing a duty upon a definite sum.

Mr. Justice ALDERSON.—I am also of opinion that the stamp in this case was sufficient; and that we must be governed by the principle of *Pruessing v. Ing*, where a stamp applicable to a promissory note not exceeding 30*l.* was held applicable to a note for the payment of 30*l.* at three months after date, *with interest* from the date. Lord Chief Justice *Abbott* there said: “The object of the legislature was, to impose a *pro rata* stamp duty upon the sum actually due at the time of taking the security, and not upon what might become due in future for the use of that money.” The express mention of expenses in the deed gave the mortgagee no better right to recover them than the law already afforded him—*Expressio illorum quæ tacite insunt nihil operatur*. *Dickson v. Cass* is distinguishable; for there the bankers would not have been entitled to commission on the monies advanced unless stipulated for in the bond.

Rule discharged (a).

(a) A bond conditioned to secure the plaintiffs to the extent of 5,000*l.*, which was held to guarantee a running account which the plaintiffs had with a third person, and not to be discharged by the first payment of 5,000*l.*, only requires a 9*l.* stamp, and not a 25*l.* as a security of an unlimited extent, under the statute 55 Geo. 3, c. 184, Schedule, part 1, title “Bond.” *Williams v. Rawlinson*, 3 Bing. 71; S. C. 1 Ryan & Moody, 233.

1862,

Tuesday,
Jan. 17th.

ANONYMOUS.

MR. Serjeant *Taddy* moved that a fine levied in *Trinity Term* last might be amended by adding a parish not named in the deed to lead the uses. The lands were described as being in the parish of *Bexley*, in the county of *Kent*; but there was one piece of meadow or pasture, described by its abuttals and occupation, which it had since been discovered was in the adjoining parish of *Eltham*. It was sworn that all the parties were alive and consenting; that the land in question was intended to pass by the fine; and that the quantities stated in the deed could not be made up without it. The learned Serjeant referred to the case of *Lambe v. Reaston* (a), where a fine was amended by inserting a parish not named in the deed to lead the uses, it being certain by the deed specifying the quantities and occupiers, that the land was intended to pass—Lord Chief Justice *Mangfield* saying (b): “This deed sufficiently shows the settlor’s intent to pass all these lands; it describes in whose possession they had been, and the number of acres, and therefore the lands do pass by the deed. No man can doubt of the intent of this deed to pass those lands: it has conveyed so many acres in the possession of *A.*, *B.*, and *C.*; the name of the parish only is mistaken, the party having been informed the land was in *Comberton*. Why did the parties mention the parish at all in the deed? It was unnecessary. It was therefore a mistake; and there being the clear intent of the parties to pass the land; the Court in this case, as in others where there is a clear intent to pass land, will amend.”

The Court allowed a fine to be amended by inserting land in a parish not named in the deed, it appearing from the description of the property in the deed, that it was the intention of the parties to pass such land, and it being necessary to make up the quantities stated therein.

Lord Chief Justice TINDAL.—As the land is specifically described in the deed, and the quantity therein mentioned

(a) 5 Taunt. 207.

(b) 5 Taunt. 211.

1832.

ANONYMOUS.

cannot be made up without that situate in the parish which it is proposed to add, I think the amendment should be allowed.

The rest of the Court concurring—

Fiat.

*Tuesday,
Jan. 17th.*

A motion to bring up a prisoner under the compulsory clauses of the Lords' act cannot be made so late as the seventh day of term.

ACRAMAN and Another *v.* HARRISON.

MR. Serjeant *Merewether* moved that the defendant, a prisoner in the *Fleet* Prison, might be brought up under the compulsory clause of the Lords' act—*32 Geo. 2, c. 28, s. 16.*

Lord Chief Justice TINDAL.—The statute enacts that, a prisoner refusing to deliver up his estate and effects to satisfy his creditors, the creditors may, on giving him twenty days' notice of such intention, compel such prisoner to be brought up and to deliver into Court a schedule of his estate and effects, and the incumbrances affecting the same, upon oath, "within the first seven days of the term which shall next ensue the expiration of the said twenty days." Now, this being the seventh day of the term, and it being impossible to bring up the prisoner before the rising of the Court, the application must be refused. The plaintiffs are not, however, without remedy: they may give another notice for the next term. But at present we have no power to order the prisoner to be brought up.

Mr. Justice PARK concurred.

Mr. Justice ALDERSON.—The case of *Langdon v. Rositer* (a) is conclusive. It was there held, that, if a pri-

(a) *M'Clel. 6; S. C. 13 Price, 186.*

soner be brought up by a rule of Court, under the compulsory clauses of the Lords' act, on a day after the first seven days of the term next ensuing the expiration of the twenty days' notice required by that act, he cannot be called upon to give in an account of his estate upon oath.

Rule refused.

COMBE and Others v. WOOLF.

THIS was an action of *assumpsit* upon the following guarantee:—

" *Penzance, May 23, 1827.*

" *Messrs. Combe, Delafield, & Co.*

" I hereby guarantee and engage to see you paid for any porter you may send Mr. *Abraham Joseph* of this town, until you receive notice to the contrary from me.

" *Leman Woolf.*"

The declaration stated, that, on the 23rd of *May, 1827*, at *Westminster*, by a certain memorandum or undertaking made and given by the defendant to the plaintiffs, the defendant guaranteed and engaged to see the plaintiffs paid for any porter which the plaintiffs might send to one *Abraham Joseph*, of the town of *Penzance*, until the plaintiffs should receive notice to the contrary from the defendant; and that the said memorandum or undertaking being so made as aforesaid, to wit, at &c., in consideration thereof, and that the plaintiffs, at the special instance and request of the defendant, had then and there undertaken and faithfully promised the defendant to per-

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The plaintiffs sued the defendant upon the following guarantee:—" I hereby guarantee and engage to see you paid for any porter you may send Mr. *A. J.* of this town, until you receive notice to the contrary from me." According to the course of dealing between the plaintiffs and *A. J.*, the latter was to have six months' credit, and then pay by a bill at two months:—*Held*, that an extension of the credit to nine months, and a bill at two months (without notice), discharged the surety.

And *semble*, that the guarantee would cover a demand properly framed.

for the casks in which the porter was sent, upon a declaration properly framed.

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form and fulfil the terms of the said memorandum or undertaking in all things on their part and behalf to be performed and fulfilled, the defendant undertook and then and there faithfully promised the plaintiffs to perform and fulfil the terms of the said memorandum or undertaking in all things on his part and behalf to be performed and fulfilled. It was then averred, that the plaintiffs, confiding in the said undertaking of the defendant, did afterwards, to wit, on &c., sell, send, and deliver to the said *Abraham Joseph*, certain porter of great value, which the said *Abraham Joseph* had occasion for and required of the plaintiffs, and at and for certain reasonable prices then and there agreed upon by and between the plaintiffs and the said *Abraham Joseph*, amounting in the whole to a large sum of money, to wit, the sum of 150*l.*: and although the said *Abraham Joseph* was, on the 1st of *April*, 1831, at &c. aforesaid, requested by the plaintiffs to pay the said sum of money, yet the said *Abraham Joseph* had not as yet paid the said sum of 150*l.*, or any part thereof, but had hitherto wholly neglected and refused so to do; of all which said premises the said defendant, on &c. last aforesaid, had notice; yet the said defendant had not as yet paid the said plaintiffs the said sum of money or any part thereof, but wholly neglected and refused so to do, and the said sum of 150*l.* still remained due and unpaid, &c.

The second count was upon an executory contract.

Plea—the general issue, and a tender of 11*l.* 5*s.*, which was admitted, and that sum taken out of Court by the plaintiffs.

The cause was tried before Mr. Justice *Park*, at the Sittings at *Westminster* after the last term. The plaintiffs proved the delivery to *Joseph*, under the defendant's guarantie, of twenty casks of porter on the 3rd *November*, 1829, at the price of 22*l.* 10*s.*, other twenty on the 1st *December*, at 22*l.* 10*s.*, and ten casks in *June*, 1830, at

11*l.* 5*s.* (a). They also claimed a sum of 17*l.* 5*s.* for the price of casks not returned by *Joseph*. These casks had been sent to *Joseph* in 1828.

The evidence as to the course of dealing between the plaintiffs and *Joseph* at the time the defendant entered into the guarantie was as follows:—*Joseph* was allowed a credit of six months, or a discount of two and a half *per cent.* for cash; and at the expiration of the six months the plaintiffs took his acceptance at two months' date: the casks to be paid for if not returned within nine months.

On the 17th *June*, 1830, the plaintiffs applied, by letter, to *Joseph* for a remittance on account of the porter sent him in *November* and *December*, 1829. Applications were again made to *Joseph* in *August* and *September*; and on the 29th of the latter month, they gave him notice, that, unless the account was settled, they would apply to the defendant. In consequence of this letter, *Joseph* remitted to the plaintiffs a promissory note for 45*l.*, dated the 4th *October*, 1830, payable two months after date; which the plaintiffs accepted, and indorsed to their bankers. *Joseph* became bankrupt on the 18th *November*, 1829.

On the part of the defendant, it was contended that he was discharged from his guarantie by the change that had (without notice to him) taken place in the course of dealing between the plaintiffs and *Joseph*: and the case of *Bastow v. Bennett* (b) was referred to, where it was held that an undertaking to be answerable to a given amount for any goods supplied by *A.* to *B.*, after goods to that amount have been supplied and paid for, still remains in force while *A.* supplies *B.* with goods on the same footing, until revoked by the surety; but that, as soon as *A.* alters the credit on which he supplies the goods to *B.*, the surety is discharged: and also the case of *English v. Darley* (c),

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(a) The sum covered by the tender.

(b) 3 Camp. 220.

(c) 2 Bos. & Pul. 61.

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where, the indorsee of a bill, having sued the acceptor to judgment, and taken out execution, received of him a sum of money in part payment, and took his security for the remainder, with the exception of a nominal sum only—he was holden to be thereby precluded from afterwards suing the indorser. It was also contended that the casks were not within the guarantie, as they were to be returned.

The learned Judge left it to the jury to say, whether the course of dealing between the plaintiffs and *Joseph* had been altered; and, if so, whether such alteration in the course of dealing had taken place with the knowledge or assent of the defendant.

The jury found that the course of dealing had been altered, and that no notice of such alteration had been given to the defendant; and they returned a verdict for the plaintiff—for 45*l.*, the price of the porter, and 17*l.* 5*s.* for the casks retained by *Joseph*—leave being reserved to the defendant to move to set aside the verdict and enter a nonsuit on the objections above mentioned.

Mr. Serjeant *Spankie* accordingly, in the last term, obtained a rule *nisi* that this verdict might be set aside and a nonsuit entered, or that the damages might be reduced by striking out the price of the casks.

Mr. Serjeant *Taddy* now shewed cause.—There is nothing on the face of the defendant's guarantie to prevent the plaintiffs from extending the credit to *Joseph*, the principal debtor; there is no stipulation to limit the credit to any particular time. There are cases in equity in which it has been holden, that, if a creditor enters into a contract with his debtor not to sue him for a given time, he cannot during that time sue a surety; for, he would thus be doing indirectly that which he could not do directly. But, in law, a surety is not absolutely discharged by time

given to the principal debtor. In the case of *The London Assurance Company v. Buckle* (a), a bond was executed by an insurance broker, with two sureties, conditioned to pay the obligees such premiums as should become due for assurances on ships at sea, to be made with the obligees by the insurance broker, within six months after the making of the insurances; the broker became bankrupt, and was indebted to the obligees in a considerable sum for premiums, and they received a dividend of six shillings in the pound under the commission: the premiums were due three years before the bankruptcy, and the obligees did not call on the sureties until after the bankruptcy—it was held that the sureties were not discharged by the *laches* of the obligees in suffering the credit of the broker to run on so long beyond the six months stipulated by the bond. In *Goring v. Edmonds* (b), the defendant guaranteed the payment of the price of certain timber sold by the plaintiff to the defendant's son: the plaintiff received part payment from the son, and afterwards made repeated applications for the residue: more than two years having elapsed from the day stipulated for payment, the son gave the plaintiff a bill of exchange, which was dishonored, and shortly afterwards became bankrupt: the plaintiff did not give the defendant notice of the dishonor of the bill, nor did he inform him of the state of the account until after the bankruptcy—it was held that the defendant was, notwithstanding, liable for the balance due. Lord Chief Justice Tindal there said (c): “It has been suggested that mere *laches* by the creditor to enforce his demand against his debtor will operate as a discharge to the surety. But there is no case which goes to that extent, whilst there are several decisions to shew that *laches* alone by the party whose debt is secured, will not discharge the surety or

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(a) 4 J. B. Moore, 153.

6 Bing. 94, *nom. Goring v. Edwards*.

(b) 3 Moore & Payne, 259; S.C.

(c) 3 Moore & Payne, 264.

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party guaranteeing its payment. There may, however, be an extreme case of negligence, which may almost amount to fraud, and fraud would be an answer to the demand as against the surety; but mere negligence is not sufficient to exonerate him." It may be admitted, that a party having the security of a third person is not at liberty to vary from the usual course of dealing with the principal debtor, nor so to conduct himself as in any degree to alter the position of such surety. An extension of credit, however, may be beneficial rather than otherwise to the surety. The mere fact of the plaintiffs having taken a promissory note from the principal debtor in this case, affords no answer to their claim against the defendant.

[Lord Chief Justice *Tindal*.—By taking the note, the plaintiffs suspended their right to sue *Joseph* until the expiration of the time the note had to run.]

In *Goring v. Edmonds*, the creditor had taken a bill from his debtor. Although the right of the plaintiffs to sue either the debtor or the surety was suspended whilst the two months were running; yet, at the expiration of that period, they might sue both. In *Bastow v. Bennett*, there was a fraud on the surety, the credit was extended to an indefinite period, contrary to the express stipulation in the guarantee. Here, there was no particular limitation of credit, and there was no course of credit established at the time the defendant gave the guarantee, there having been no previous dealing between the plaintiffs and *Joseph*.

With regard to the casks, it is contended on the part of the defendant that he is not chargeable with them, inasmuch as the guarantee and the declaration are both silent in that respect: but the liability for the casks necessarily follows the liability for the porter.

Mr. Serjeant *Wilde*, in support of the rule, was stopped by the Court.

Lord Chief Justice TINDAL.—I am of opinion that this rule must be made absolute. Two questions arise for our consideration—first, in respect of the plaintiffs' demand for 45*l.*, the price of porter furnished by them to *Joseph*—secondly, as to the 17*l.* claimed for the casks, not containing the porter for the price of which this action is brought, but porter which had been furnished at an antecedent period, and which casks had not been returned by *Joseph*.

As to the demand for 45*l.*, the price of the porter, I think the defendant was discharged from liability on the guarantie, by the time given by the plaintiffs to the principal debtor; the alteration in the course of dealing not having been assented to by the defendant. The evidence was distinct that the ordinary course of dealing between the plaintiffs and *Joseph* was, that the plaintiffs should, at the expiration of a credit of six months, take a bill at two months for the amount. But here it appears, that, after a credit of nine months, the plaintiffs had taken from *Joseph* a bill at two months: thus extending the credit to eleven instead of eight months. This was not a mere voluntary extension of the time of payment by delaying to enforce their rights against their debtor; but, by taking *Joseph's* acceptance, the plaintiffs bound themselves not to sue him for the debt until the expiration of the time the bill had to run. The defendant was therefore, on principle, discharged from his suretyship; for, the plaintiffs, by giving time to the principal debtor, without the assent of the defendant, thereby materially altered the situation in which it was intended that his guarantie should place him.

It has been contended, that, although this may be the rule adopted in Courts of equity, that principle has never obtained in Courts of law. But, except where a surety has entered into a bond for payment on default of the principal debtor, the Courts of law, as well as those of equity, have invariably held the surety to be discharged, where time has, without his assent, been given to the pri-

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principal debtor. Where the surety has given such a bond, and by a parol agreement time has been given to the principal debtor, the surety is compelled to resort to equity, because by the rules of law a parol agreement cannot be pleaded in discharge of an instrument under seal (a). In the present case there is, upon the face of the guarantie, no stipulated time for payment; but, although the period of credit was not expressed, it was virtually understood between the parties that the credit should not exceed that which was usual in the particular trade; and that, by the evidence, appears to have been eight months and no more. By the extension of the credit to eleven months, the situation of the defendant as surety was materially altered. The principal debtor might in the interim have become bankrupt or insolvent, and the surety would thus be, by the *laches* of the creditor, deprived of an opportunity of indemnifying himself.

With regard to the second point—as to the casks—if they had been the identical casks that had contained the porter in respect of which the action is brought, probably they might have been deemed accessory, and following the principal demand: but here, it appears that the casks for which the plaintiffs seek to recover were casks which had contained porter not covered by the guarantie. Besides, the declaration is not so framed as to include such a demand.

Mr. Justice PARK.—I am of the same opinion. In coming to this conclusion we do not infringe on any of the cases which have decided that the mere circumstance of delay on the part of the creditor in suing the principal

(a) See *Davey v. Prendergrass* (5 Barn. & Ald. 187; S. C. 2 Chit. Rep. 336), where it was held that it is not an defence at law to an action on a bond against a surety,

that by a parol agreement time has been given to the principal. See also *Rees v. Barrington*, 2 Ves. 542.

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debtor does not discharge the surety. Thus, in *English v. Darley*, where the indorsee of a bill of exchange, having sued the acceptor to judgment, and taken out execution, received of him a sum of money in part payment, and took a security for the remainder, with the exception of a nominal sum only—it was held that he was precluded from afterwards suing the indorser. The distinction is taken in *Orme v. Young* (a), between the mere delay of the creditor to sue the principal debtor, and the giving him a right to further time. It was there contended that the neglect of the creditor to give notice to the surety that the principal had made default, and the abstaining to proceed against the latter, discharged the surety: but Lord Chief Justice Gibbs held that it did not. He says: “What is forbearance and giving time? It is an engagement which ties the hands of the creditor. It is not negatively refraining, not exacting the money at the time; but it is the act of the creditor depriving himself of the power of suing by something obligatory, which prevents the surety from coming into a Court of equity for relief: because, the principal having tied his own hands, the surety cannot release them. Here, there is no contract to forbear; no impediment to the suit. A neglect to give notice to the surety that the debtor has made default, does not discharge him.” The true principle is there forcibly put, and bears decidedly upon the present question. Here, there was a positive bar to the plaintiffs’ right to sue the principal for a certain period; they had tied up their hands for the two months that the bill they took from the principal debtor had to run: during that period the surety could not come in.

With regard to the question as to the casks, I think the defendant would be liable (if liable at all) for accessary casks, *viz.* those that contained the porter in question; but the casks for which the plaintiffs here seek to charge the

(a) Holt, N. P. C. 84.

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defendant were delivered at a different period; and therefore they cannot fall within the guarantie. The short answer to this part of the case, however, appears to me to be this, that the casks are not covered by the declaration. They are not goods sold, the sale being only contingent, viz. in case they should not be returned within a given period.

Mr. Justice BOSANQUET.—I am also of opinion that the surety in this case was discharged of his liability by the conduct of the creditor. The guarantie does not specify any particular credit; but that would be regulated by the course of dealing between the parties at the time the guarantie was entered into. That course of dealing has been altered, and the credit extended, without the knowledge or assent of the surety. It is admitted that the defendant would not have been liable to be sued during the period of the extension of credit; but it is contended that after the expiration of that time the plaintiffs' right to resort to him revives, it having been in the interim only suspended. Now, this suspension of the plaintiffs' right to sue is supposed to be effected, not by agreement between the parties, but by operation of law; that is to say, that the time given to the principal debtor would be a bar to an action brought against the surety within the time so given. If, however, the plaintiffs' right to sue be barred in law, without any agreement between the parties, it is barred for ever. An agreement by the creditor to suspend his rights as against the principal debtor, would clearly be prejudicial to the surety, provided his liability remained; for, the debtor might become insolvent during the period of suspension. The relative positions of the parties are materially altered by the creditor having bound himself not to proceed against his debtor for such extended period.

I think the plaintiffs cannot recover for the price of the

casks. The course of dealing as to the casks was totally distinct from the dealing as to the porter. Whether the casks were covered by the guarantie or not, the declaration was not so framed as to include them.

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Mr. Justice ALDERSON.—I am of the same opinion. The case of *Orme v. Young* decides the first point. The true distinction is this—the mere refraining on the part of the creditor from suing the principal debtor does not discharge a surety; but, where time is, without the assent of the surety, given by a contract that is binding on the creditor, the surety is discharged. In the present case, the plaintiffs precluded themselves from suing their debtor during the period the bill had to run. That altogether discharged the defendant of his suretyship.

With regard to the second point, it may admit of doubt whether the guarantie applied to the casks in which the porter was sent; but no such question can arise here, because the casks for which the plaintiffs claim were not the identical casks which had contained the porter for which they sue; neither is the declaration so framed as to entitle the plaintiffs to recover for them if they were so.

Rule absolute (a).

(a) See *Philpot v. Briant* (1 Moore & Payne, 754), where it was held that a mere delay by the holder of a bill of exchange to sue the acceptor, does not discharge the drawer or indorsers, the right to sue not being suspended. Lord Chief Justice Best, in delivering the judgment of the Court, there said: "A creditor, by giving further time of payment, undertakes that he will not, during the time given, receive the debt from any

surety of the debtor; for, the instant that a surety paid the debt, he would have a right to recover it against his principal. The creditor, therefore, by receiving his debt from the surety, would indirectly deprive the debtor of the advantage that he had stipulated to give him. If the surety were allowed to pay the debt at the time when he undertook that it should be paid, the principal debtor might have the

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Jan. 21st.

The Court refused to change the *venue* in an action on a policy of insurance, at and from *Bristol to London*, on the ground that nearly all the witnesses resided in *London*—the cause being ready for trial at the approaching assizes.

PALMER v. MARSHALL.

THIS was an action on a policy of insurance for 1,500*l.*, upon the yacht *Ruby*, at and from *Bristol to London*, which was lost upon the voyage. The cause was tried before Mr. Justice *Taunton* at the last Assizes for the county of *Dorset*, when there was a verdict for the plaintiff, which verdict was afterwards set aside by the Court, on the grounds of misdirection, and that the verdict was against evidence, and a new trial directed (a).

Mr. Serjeant *Wilde*, on the part of the defendant, on a former day in this term, obtained a rule *nisi* that the *venue* might be changed from *Dorsetshire to London*, upon affidavits stating that both the plaintiff and defendant resided in *London*, and that all the witnesses upon the first trial were taken down from *London*.

means of repaying him. Before the expiration of the extended period of payment, the principal debtor might have become insolvent. A creditor, by giving time to the principal debtor, in equity, discharges the obligation of the sureties. A Court of equity will grant an injunction to restrain a creditor who has given further time to the principal, from bringing an action against the surety. This equitable doctrine Courts of law have applied to cases arising on bills of exchange. The acceptor of a bill of exchange is considered as the principal debtor. All the other parties to the bill are sureties that the acceptor shall pay the bill, if duly presented to him, on the day it becomes due;

and, if he do not then take it up, that they, on receiving notice of its non-payment, will pay it to the holder. If the holder give the acceptor further time for payment, without the consent of the drawer or indorsers, he discharges them from all the liability that they contracted by becoming parties to the bill. But, delay in suing the acceptor will not discharge the drawer or indorsers, because such delay does not prevent them from doing that which, on receiving notice of non-payment by the acceptor, they ought to do, *viz.* paying the bill themselves. The time of payment must be given by a contract that is binding on the holder of the bill."

(a) *Vide ante*, p. 161.

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Mr. Serjeant *Merewether* now shewed cause upon an affidavit which stated that three of the plaintiff's witnesses resided in *Dorsetshire*, and another at *Bristol*; and he submitted that the application was too late; that it ought to have been made before plea pleaded; and that the only object of the defendant could be delay, the cause being ripe for trial at the ensuing Assizes.

Lord Chief Justice TINDAL.—No sufficient reason has been adduced to warrant the Court in granting this application. The plaintiff might lay the *venue* where he pleased. The motion to change it should not have been made in so late a stage of the cause. If the *venue* were now to be changed to *London*, the plaintiff would lose the opportunity of trying his cause at the next Assizes.

The rest of the Court concurring—

Rule discharged.

SELBY v. HILLS.

Monday,
Jan. 23rd.

MR. Serjeant *Goulburn*, on a former day in this term—on an affidavit of the defendant, that, on the 19th *December* last, he, as petitioning-creditor, caused a commission of bankrupt to be issued against one *Prigott*; that, on the 30th of that month, he attended at the court of commissioners in *Basinghall Street* for the purpose of proposing himself as an assignee, and of watching the proceedings under the commission; that, when the business of the day was concluded, he set off upon his return to *Bexley*, in *Kent*, where he resided; and that, as soon as he had crossed *London Bridge*, he was arrested at the suit of the plaintiff—obtained a rule *nisi* that the defendant might be discharged out of custody, he having rendered in discharge of his bail, and that the undertaking which his attorney

A petitioning creditor attending the commissioners for the purpose of watching the progress of the commission and of proposing himself as an assignee, is protected from arrest, *cumdo, morando, et rediendo*: and it is for the party who seeks to oust him of his privilege to shew an unreasonable delay or an improper deviation from his course home.

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had given, to put in bail above or to render the defendant, might be cancelled, with costs. He referred to the case of *Willingham v. Matthews* (a), where it was held that a person attending the insolvent debtors' court for the purpose of opposing the discharge of a debtor, is privileged from arrest, in the same manner as when in attendance upon any other Court. Lord Chief Justice Gibbs there said (b): "With respect to the insolvent debtors' court being such a tribunal as to privilege a party from arrest, considering that it is a judicature created by the legislature, I think that parties attending the court must be considered as privileged from arrest." He also referred to the case of *Spence v. Stuart* (c), where it was held that a defendant in a cause attending an arbitrator to be examined under a rule of Court, is privileged from arrest *en-do, morando, et redeundo*.

Mr. Serjeant Jones shewed cause, upon an affidavit which alleged that the arrest was made two hours after the defendant had left the court in *Basinghall Street*; and that he had in the meantime made several calls both in the city and at *Westminster*.—A party going before commissioners of bankrupt to prove a debt is not privileged from arrest—*Kinder v. Williams* (d): at all events, the application to discharge him if arrested must be made to the Court of *Chancery*. *Ex parte List* (e). Besides, to entitle a party to privilege under any circumstances, it should be made appear to the Court that he was *bond fide* proceeding with due diligence on the direct course towards his residence; whereas, in the present case, the arrest took place two hours after the rising of the Court, and at a very short distance from it.

(a) 2 Marsh. 57; S. C. 6 Taunt.
356.

(b) 2 Marsh. 58.

(c) 3 East, 89.

(d) 4 Term Rep. 377.

(e) Maddocks, 49; 2 Rose, 24.

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Mr. Serjeant Goulburn, in support of his rule, was desired by the Court to confine himself to the last point, *viz.* whether the defendant was *bond fide* proceeding towards his home, or whether he had deviated from the proper course, or been guilty of improper delay.—The privilege from arrest extended to persons attending judicial proceedings is always construed with liberality. In *Lightfoot v. Cameron* (a) a party who had attended his cause all day in Court, and retired in the evening to dine with his attorney and witnesses at a tavern, was held to be privileged from arrest. In *Willingham v. Matthews*, Lord Chief Justice Gibbs said (b): “The defendant, a short time after he left the Court, was arrested by the sheriff’s officer, who now swears that he was not in the *direct* way towards his home. What is or is not the direct way, ought not to be measured by the consciences of persons who swear in that general form. A person is not bound to go the nearest or most direct way, as the officer may happen to think it; and whenever a party is attending a Court of justice, the Courts have always considered him as privileged in his way homewards, with a fair and liberal construction.” The like doctrine was laid down by Lord Ellenborough in *Spence v. Stuart*—“This defendant was clearly privileged; and the privilege extends to one *redeundo* as well as *cundo et morando*. And it does not appear that he has been guilty of any negligence in not availing himself of his privilege *redeundo* within a reasonable time; for he was arrested early the next morning, before it could be known whether he were about to return home or not.” There is nothing in the present case to shew that the defendant was other than in the *bond fide* assertion of the privilege which the law allows.

Lord Chief Justice TINDAL.—This rule must be made

(a) 2 Sir W. Blac. 1113.

(b) 2 Marsh. 59.

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absolute. I think the petitioning creditor attending the commissioners at the opening of a commission of bankrupt falls within the cases which have decided that parties are exempted from arrest whilst going to or returning from Courts of justice. The petitioning creditor has as much interest in attending before the commissioners of bankrupt as an opposing creditor has in giving his attendance at the insolvent debtors' court. The case of *Willingham v. Matthews* is in point. It was there held that a person attending the insolvent debtors' court for the purpose of opposing the discharge of a debtor, is privileged from arrest, in the same manner as when in attendance upon any other Court. I also think that the application to discharge the defendant was properly made to this Court, inasmuch as the process issued out of this Court, and we are bound to see that it is not improperly put in force (a).

The only question to be considered is, whether the defendant was honestly using his privilege, or whether he only sets it up as a pretence to defeat a creditor. The rule is not to be scanned with too strict an eye; every reasonable intendment is to be made in favor of a party claiming exemption under it. The affidavit on the part of the plaintiff is not so precise and satisfactory as to convince me that the defendant was abusing the privilege. He was arrested whilst on his progress towards home; in a line from the court of commissioners to *Bexley*, where he resided. The *onus* therefore lay on the plaintiff to shew that the defendant was unduly availing himself of the privilege, and out of his proper course. The affidavit states that the arrest was made two hours after the defendant left the court, and that he had called in the mean time at several places out of his way; but the deponent does not state this of his own knowledge,

(a) See *Walker v. Webb*, 3 Anst. 941—*Ricketts v. Gurney*, 1 Chit. Rep. 682; S. C. 7 Price, 699.

he only states that he had heard it. The two hours might have been devoted to refreshment; and there is nothing inconsistent with what is sworn, in supposing that the calls alleged to have been made by the defendant, were made on his way to the court.

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Mr. Justice PARK.—I am clearly of opinion that a petitioning creditor attending the court of commissioners is protected from arrest *eundo et redeundo*. He is interested in the proceedings, and stands in the same situation as the parties to a suit. The bond which a petitioning creditor enters into on the issuing of the commission, necessarily requires that he should be in attendance before the commissioners at the opening of the commission, to prove his debt and establish the act of bankruptcy: he is responsible for the due prosecution of the commission. The application to discharge the defendant out of custody is properly made to the Court whence the process issued the abuse whereof is complained of. I agree with my Lord Chief Justice, that this is a privilege that should not be dealt with too strictly: the party is not bound to go home directly and without the slightest delay. The cases of *Lightfoot v. Cameron* and *Willingham v. Matthews* are strong authorities on the subject. Besides, in the present case, the affidavit is far too loose.

Mr. Justice BOSANQUET.—I am also of opinion that the defendant is entitled to be discharged from the arrest. He had a sufficient interest in the proceedings before the commissioners of bankrupt to justify his attendance before them, and to protect him from arrest in his progress to and fro; and I think the application is properly made to this Court, its process having been unduly executed. The only remaining question is, whether the defendant was in the due assertion of his privilege. It appears that he was arrested on the Surrey side of London Bridge, which

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was in the direct line towards his place of abode, two hours after he had quitted the commissioners' court in *Basinghall Street*. The time was short; and the distance, it is true, is also very short: but the plaintiff, who seeks to vindicate and uphold the arrest, ought to shew the Court in what manner those two hours had been employed. His affidavit on this subject is not sufficiently explicit.

Mr. Justice ALDERSON.—The defendant was clearly interested in attending before the commissioners—like a party to a cause. *Ricketts v. Gurney* (a) is an authority to shew that the application to discharge from custody one arrested under circumstances like the present, may be made to the Court out of which the process issued upon which the party was arrested. With respect to the last point, I entertain some doubt. In *Randall v. Gurney* (b), where a party residing in *L.* was summoned to attend an arbitrator at *E.*, and was required to bring with him certain papers then at *C.*, and he went to the latter place, where all his papers were, to make a selection, and having stayed there more than twenty-four hours for that purpose and for necessary refreshment, the majority of the Court of *King's Bench* held that he was not entitled to be discharged out of custody, having no right to stop and sort his papers. In the present case, however, the defendant has shewn that he was in the direct line towards his home: that, perhaps, was enough for the purpose of this application, and throws on the other party the onus of shewing distinctly how the time which had elapsed had been employed.

Rule absolute, without costs (a).

(a) 7 Price, 699; S. C. 1 Chit. Rep. 682.

(b) 1 Chit. Rep. 679; S. C. 3 Barn. & Ald. 252.

(c) See *Kinder v. Williams* (4

Term Rep. 377), where the Court of *King's Bench* refused to discharge a person in custody by process of the sheriff's court, in a cause afterwards removed into

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*Monday,
Jan. 23rd.*

DOE *d.* PEARSON *v.* RIES and KNAPP.

THIS was an action of ejectment. The lessor of the plaintiff claimed title to the premises in question under the following instrument:—

“Memorandum of an agreement made this 21st day of September, 1829, between Messrs. *John, James, William, and Henry Knapp*, of *Cirencester Place and Foley Street*, in the parish of *St. Mary-le-bone*, and county of *Middlesex*, builders, on the one part, and Mr. *William Pearson*, of *London Wall*, in the city of *London*, auctioneer, of the other part:

“The said *John, James, William, and Henry Knapp* agree to let, and the said *William Pearson* agrees to take, all that house and premises, exhibition-room, vaults, and cellars, in the unfinished state they are now in, situate on the south side of the *Strand*, and known as numbered 101 and 102, the same being in depth from the *Strand* to *Fountain Court*, and in the parish of *St. Clement's Danes*, and county aforesaid, for the term of sixty years, or thereabouts, being the whole term that they the aforesaid *John, James, William, and Henry Knapp* have the same premises leased unto them, at the yearly rent or sum of 525*l.*, clear of the land-tax, and all other rates, taxes, and assessments whatsoever that now are or may be hereafter imposed by act of parliament or otherwise, whether par-

By a memorandum of agreement dated the 21st September, “*A. and B.* agreed to let, and *C.* agreed to take, all that house and premises, in the unfinished state they are now in, situate &c., for the term of sixty years, or thereabouts, being the whole term that they the aforesaid *A. and B.* have the same premises leased unto them, at the yearly rent of 525*l.*, payable quarterly, on the four most usual days of payment of rent; the first payment to be made for the half quarter at Christmas next. The said *C.* also agrees to insure the premises in 5,000*l.* The said lease and counterpart to be prepared by the attorney of the said *A. and B.*, and at the expense of *C.*, and to contain

all the clauses, covenants, and agreements that they the said *A. and B.* have entered into and agreed upon in the lease granted unto them of the aforesaid premises. *C.* to have the benefit of the insurance which has been lately paid.” *C.* was let into possession under the memorandum:—*Held*, that it amounted to a present demise, conveying to *C.* an immediate interest in the premises, in respect of which he might maintain ejectment.

the former Court, on the ground that he had been arrested while attending commissioners of bank-

rupt, to prove a debt. See also *Rex v. Priddle*, 1 Tidd's Practice, p. 198.

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liamentary or parochial; the said rent to be paid quarterly, on the four most usual days of payment of rent; the first payment to be made for the half quarter at Christmas next. The said *William Pearson* also agrees to insure the whole of the premises in the *Westminster Fire Office* for the sum of 5,000*l.*, in the joint names of *William Pearson* and *John, James, William, and Henry Knapp*, or such other name or names as they may appoint. The said lease and counterpart to be prepared by the attorney of the said *John, James, William, and Henry Knapp*, and at the expense of the said *William Pearson*, and to contain all the clauses, covenants, and agreements that they the said *John, James, William, and Henry Knapp* have entered into and agreed upon in the lease granted unto them of the aforesaid premises. Mr. *Pearson* to have the benefit of the insurance which has been lately paid, without any charge or expense to himself for the same."

" In witness &c."

The cause was tried before Lord Chief Justice *Tindal*, at the Sittings at *Westminster* after the last term when it appeared, that, at the time the agreement was executed, the premises in question were in an unfinished state, and would require a considerable sum to be laid out upon them to render them tenantable; and that *Pearson* was let into immediate possession under the agreement. It further appeared, that, previously to entering into the above agreement, the *Knapps* had mortgaged the premises to one *Fincham*, at whose expense the present action was defended. The agreement was upon a 35*s.* stamp.

On the part of the defendants, it was contended that the lessor of the plaintiff was not entitled to recover, as the instrument above set forth did not amount to an actual and present demise of the premises, but was a mere agreement for a future lease. They also attempted to set up the title of *Fincham*, the mortgagee.

The jury found, that the lessor of the plaintiff had been let into possession under the agreement, and accordingly returned a verdict for him.

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Mr. Serjeant *Starks*, on a former day in this term, in pursuance of leave reserved at the trial, moved for a rule nisi that the verdict might be set aside and a nonsuit entered, on the objection taken to the form of the instrument; or for a new trial, on the ground that the defendants had been improperly precluded from setting up the title of *Fincham* in answer to the action (a).

The Court granted the rule upon the first point; but, as to the second, held, that, as *Fincham* was no party to the present record, his title could not be set up as a defence to this ejectment.

Mr. Serjeant *Wilde* and Mr. Serjeant *Bompas* now shewed cause.—

The instrument in question amounted to a present demise, and operated at law as an assignment of the whole term that the lessors had in the premises; and the lessor of the plaintiff took an immediate interest under it. The only circumstance upon the face of the document calculated to raise any doubt as to the intention of the contracting parties is that no rent was to be paid for the first half quarter; but that is accounted for by the fact that the premises were unfinished: and all doubt is removed by the lease being let into immediate possession under the agreement. The delivery of possession was to be contempora-

(a) Upon this point *Doe d. Locks v. Franklin* (7 Tann. 9; S. C. 1 Chit. Rep. 390 a) was cited. There, a landlord defrayed the costs of defending an ejectment in the name of an illiterate tenant:

the latter gave a *retracit* of the plea, and *cognovit* of the action; and this Court set aside the *retracit* and *cognovit*, and permitted the lessor to defend as landlord.

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neous with the execution of the instrument. The agreement provides that the lessee shall have the benefit of the insurance that had lately been effected upon the premises. That necessarily supposes an immediate interest in him. If the house had been burnt down after the execution of the instrument, the responsibility arising therefrom would have fallen upon the lessee.

The Court called upon Mr. Serjeant *Storks* and Mr. Serjeant *Stephen* to support the rule.—Whether an instrument shall be a lease, or only an agreement for a lease, depends upon the intention of the parties, as it is to be collected from the instrument—*Morgan d. Dowding v. Bissell* (a). Sir *James Mansfield* there said (b): “When the party enters into that which on the face of it appears to be an agreement, though there are words of present demise, yet, if you collect on the face of the instrument the intent of the parties to give a future lease, it shall be an agreement only. It would be a very wise rule, that, whenever one person is about to grant, and another to take a lease, until the lease was actually executed no interest at law should pass.” In *Goodtitle d. Estwick v. Way* (c) it was held that words of present contract, with an agreement that the lessee should take possession immediately, and that a lease should be executed in future, operate only as an agreement for a lease, and not as a lease: and this is confirmed by many subsequent cases. The whole current of the modern authorities shews such an agreement as the present to be executory rather than executed. The only cases to the contrary are those of *Poole v. Bentley* (d), and the late case of *Pinero v. Jud-*

(a) 3 Taunt. 65.

(b) 3 Taunt. 72, 73.

(c) 1 Term Rep. 735.

(d) 12 East, 168; S. C. 2 Camp.

286. There, the terms of the in-

strument were, that one “thereby agreed to let, and the other agreed to take land for sixty-one years, at a certain rent, for building; and the tenant agreed to lay out £1000.

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as (a): in both those cases there were stipulations that the agreement should be binding until a more formal lease could be prepared, and the terms and covenants were expressly agreed on, and not left in uncertainty, as here. But there is no case where it has been held that the agreement is executed, or amounts to an actual present demise, when there is an express stipulation for the future execution of a lease, unless it be clear that the parties meant it to operate as a present demise. In *Doe d. Coore v. Close* (b), an instrument reciting that A. in case he should be entitled to certain premises on the death of B., would immediately demise the same to C., declaring that he did thereby agree to demise and let the same, with a subsequent covenant to procure a licence to let from the lord, was held to operate only as an agreement for a lease, and not as an absolute demise. In that case, the premises being copyhold, a licence from the lord was requisite to the validity of the lease: so here, the legal title was in the mortgagee; the *Knapp* had only an equitable interest, and could not grant an absolute lease without the concurrence of the mortgagee. In *Tempest v. Rawling* (c),

within four years, in building five or more houses," and, when five houses were covered in, the landlord agreed to grant a lease or leases; but that agreement was to be considered binding till one fully prepared could be produced—the instrument was held to operate as a present lease.

(a) 3 Moore & Payne, 497; S. C. 6 Bing. 306. By an instrument in writing, A. B. agreed to grant, seal, and execute to C. D. a legal and effectual lease of premises for a term of years, at a certain annual rent, and subject to covenants by C. D., to pay the

rent and taxes, to keep the premises in repair, and to paint them every third year, and leave them in good repair at the end of the term: and C. D. agreed to accept the lease upon the above terms, and, in the mean time, and until such lease should be made and executed, to pay the rent, and to hold the premises subject to the covenants above mentioned—it was held that this was an actual demise, and not merely an agreement for a future lease.

(b) 2 Term Rep. 739.

(c) 13 East, 18.

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an instrument executed in November, setting forth the conditions of letting a farm, and the regulations to be observed by the tenant, that the term was to be from year to year, and the lands to be entered upon in February following; and that a lease was to be made on those conditions, with all usual covenants, was held to be an agreement for a lease, and not a present demise. And in *Dent v. Hunter* (a), where a tenant was in possession under a memorandum of agreement to let on lease (with a purchasing clause) for twenty-one years, at a net rent, and the tenant was to enter at any time on or before a given day, it was held only to amount to an agreement for a future lease. Lord Chief Justice Abbott there said: "Looking at this instrument, I cannot infer when the tenancy was to commence, or the rent to become due." In the present case, the lessee's liability to the payment of rent was not to be contemporaneous with the execution of the agreement; neither is there any room to infer that the possession was to be immediate. The tenancy under the agreement was a mere tenancy at will (b), and no interest was conveyed to the lessor of the plaintiff, in respect of which he could maintain an ejectment.

Lord Chief Justice TINDAL.—Upon the form of this instrument, and upon the authority of the decided cases, I am of opinion that the agreement in this case conveys a present interest in the premises to the lessor of the plaintiff, and is not merely executory, but amounts to a lease. The leading principle, which has for a long period been established, is, that the words of the instrument are to be looked at to enable the Court to ascertain what was the paramount intention of the parties: and if the language be doubtful or ambiguous, we may call in aid acts done by

(a) 5 Barn. & Ald. 323.

Dow. & Ry. 306; 8 C. 2 Barn.

(b) See *Hamerton v. Stead*, 5 & Cras. 478.

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the plaintiff at the time of entering into the contract; to evidence their intention. The two strong points upon which the defendants rely, to show that the agreement is not to operate as a present demise, are—*first*, that there is an express stipulation for the future execution of a lease and counterpart—*secondly*, that no rent was to be paid for the half quarter immediately succeeding the execution of the agreement. On the other hand, the lessor of the plaintiff contends that the instrument contains words of present demise; and that the lessor of the plaintiff was let into possession under it; and therefore that it operates as a lease, and not as a mere agreement for a lease.

First, as to the stipulation for a future lease. There are cases where it has been held, that, where such a stipulation is introduced, the agreement is only executory; but, in all those cases, the terms of the proposed lease have been uncertain, and there is a general stipulation that the lease shall contain all the usual covenants: whereas here it is provided that the lease shall contain "all the clauses, covenants, and agreements that they the said *I., J. W., and H. Knapp* have entered into and agreed upon in the lease granted unto them of the aforesaid premises." There is therefore a reference to covenants the nature of which was within the means of knowledge of the parties at the time; and it must be assumed either that the lessee saw the original lease, or that the nature of the covenants had been represented to him by the *Knapps*. The mere circumstance of the agreement referring to a future lease, does not of necessity carry us to the same conclusion as the Courts have arrived at in other cases where the agreements have contained similar clauses.

The second point urged on the part of the defendants is, that there is no precise time for the commencement of the rent specified. If this had been left in uncertainty and without limits, it would have afforded strong ground for saying that the lessee took no interest under the agreement

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until the rent was payable; but the accompanying circumstances of the case lead us irresistibly to a contrary conclusion. It is true there is no provision as to the precise moment from which rent is to become payable. The instrument bears date the 21st *September*; and the first payment is to be made for the half quarter at *Christmas* ensuing, that is to say, that the rent shall commence at the expiration of the six weeks from *Michaelmas*: and the lessee was actually let into possession at the time. Besides, at the time the agreement was executed, the house was in an unfinished state; and it appears to have been the intention of the parties that the lessor of the plaintiff should be allowed time to finish them before the rent commenced, as he would in the interim have no enjoyment of the premises.

The main argument on the part of the lessor of the plaintiff is, that the instrument in question contains words of present demise. The lessors agree to let, and the lessee agrees to take. Throughout all the authorities, from the case of *Goodtitle* d. *Estwick v. Way*, to the present time, these words have been held to import a present demise. In this case possession has been given by the landlords under this instrument. Now, we can have no better guide to lead us to the conclusion that it was intended to pass an immediate interest; than the act of the lessors in putting into possession a man whom they might afterwards be compelled to turn out by an ejectment. I do not, however, rely exclusively upon these arguments. There are several clauses in the instrument which tend the same way. The premises were in an unfinished state, and were to be completed by the tenant; and, supposing the agreement not to convey a present interest, when he had completed the repairs, the tenant might be turned out; and in that case his only remedy would be by a suit in equity to compel the lessors to execute a lease. The lease is not for a smaller term than the *Knapps* possessed; it operates in law as an

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assignment of the whole of their interest, without reservation, to the lessor of the plaintiff. The instrument contains further stipulations that the premises should be insured by the lessor of the plaintiff in his own name and those of the *Kaapps*; and that the former should have the benefit of the insurance which had been lately effected. The interest must therefore be vested in him in the mean time. Upon the whole, I think that the intent, to be collected from the entire instrument, and from the acts of the parties, was, that the lessor of the plaintiff should have a legal demise, clothed with a legal possession; and therefore that he is entitled to recover. The case of *Goodtitle d. Estwick v. Way* does not apply; for, there the proposed leases were to contain the usual covenants, and it was uncertain what they might be.

Mr. Justice PARK.—The intention of the parties is the governing principle in all these cases; and that intention is to be collected from the whole of the instrument. It seems to me that it was the intention of the parties here that the whole term should be assigned to the lessor of the plaintiff. He was let into possession, and was to do certain repairs, and was to have the benefit of the insurance then lately effected on the premises, and was put into immediate possession. The premises being unfinished, no rent was to be paid for the first half quarter. All the clauses of the instrument taken together shew a clear intention that it should operate as a present demise. The leading cases upon this subject are collected in *Pinero v. Judson*, and *Stanforth v. Fox*, lately determined in this Court, and the whole of them are consistent with our present decision. In *Roe d. Jackson v. Ashburner*, Mr. Justice Ashhurst says (a): "I entirely agree to the position, that, whether an agreement of this kind shall or shall not be considered as a lease

(a) 5 Term Rep. 168.

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ought to depend on the intention of the parties, which must be collected from the words of the agreement, and from collateral circumstances. Where the words are *de presenti*, 'I demise, &c.' or an agreement 'that the party shall hold and enjoy,' and the party is immediately put into possession, the landlord shall not afterwards turn him out of possession, and say that it was not a present demise; for, the permitting the party to enter is strong evidence to shew that the landlord intended to give a present interest. But, where the words themselves do not necessarily imply it, and where possession is not given, and there is no other act to manifest such an intention, then it is merely an executory contract." That argument is precisely applicable here. The case of *Goodtitle d. Estwick v. Way* differs materially from the present: there the term for which the lease was to be granted was not agreed on; it was uncertain whether it was to be for seven or fourteen years; all was to be *in futuro*. In *Doe d. Coore v. Clare*, the party had no power to grant a lease; and in *Tempest v. Rawling*, there was an express stipulation for a future lease, and there was no present occupation under the agreement. But, in *Poole v. Bentley*, which is a leading case upon this subject, it was decided that a clause for a future lease does not of itself necessarily intend that the instrument must be only an agreement for a lease, if the intention of the parties appear to be otherwise. I am therefore of opinion that the rule should be discharged.

Mr. Justice BOSANQUET.—I am of the same opinion. The question is, whether it was the intention of the parties at the time this instrument was made, that the lessor of the plaintiff should take a present interest under it, or whether his interest in the premises was to depend upon the execution of a lease at a future period. It would be very convenient to find a certain criterion for the construction of documents of this description; but, as these agree-

ments are so multiform, no general rule for their construction can be laid down: each must depend upon its own peculiar tenor and its accompanying circumstances. The stipulation for a future lease is not of itself conclusive; it is only one ingredient in the composition: the whole instrument must be looked at together, in order that it may receive its true construction. The instrument in this case contains words of present demise; and the only question is, whether the reference to a future lease is to override the entire agreement, and prevent the lessor of the plaintiff from taking an immediate interest under it. The whole facts of the case shew clearly what must have been the intention of the parties. The house, which is in an unfinished state, is, to be completed at the expense of the lessor of the plaintiff, and in consideration of that circumstance he is to be excused from paying the first half quarter's rent. Nothing is more common than for a landlord to allow an abatement of a portion of the rent, where the tenant undertakes to lay out money upon the premises. All the other provisions also tend to shew that the interest of the lessor of the plaintiff in the premises was to commence immediately, and without reference to any future lease. The tenant is to have the benefit of the existing policy of insurance; a provision incompatible with the supposition that his interest was only in prospect. Then, the argument as to the covenants of the proposed lease being uncertain, fails, for it is agreed that the lease shall contain all the clauses, covenants, and agreements that the *Knapps* had entered into in the lease of the premises granted to them; and, as that lease was or ought to have been in their possession, we must infer that they had full knowledge upon the subject—*Id certum est quod certum reddi potest.*

Mr. Justice ALDERSON.—The principle upon which these cases proceed has been so fully discussed by the rest of the Court, that I need only express my concurrence in

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the opinions pronounced by them. There is nothing in this instrument to shew that it was not intended by the parties that the lessor of the plaintiff should take an immediate interest under it. A contrary construction would operate injustice to the tenant, who would thus be rendered liable to be turned out of possession after he had laid out a large sum of money in finishing the house. Where the stipulations are involved in doubt, the instrument certainly cannot operate as a present demise: but, in the present case, the terms of the holding are sufficiently expressed by the reference to the lease under which the landlords held. The mere circumstance of the parties stipulating for the execution of a more formal security, will not alter the construction of the rest of the instrument.

Rule discharged (a).

(a) See *Bacon's Abridgment*, title "Leases," (K.), where it is laid down, that, "whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession, and the other come into it for such a determinate time, such words, whether they run in the form of a license, covenant, or agreement, are of themselves sufficient, and will, in construction of law, amount to a lease for years, as effectually as if the most proper and pertinent words had been made use of for that purpose: and, on the

contrary, if the most proper and authentic form of words whereby to describe and pass a present lease for years is made use of, yet, if upon the whole deed there appears no such intent, but that they are only preparatory and relative to a future lease to be made, the law will rather do violence to the words than break through the intent of the parties."

And see *Drake v. Munday*, Cro. Car. 207—*Barry v. Nugent*, 5 Term Rep. 165, n.—*Doe d. Walker v. Groves*, 15 East, 244.

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Tuesday,
Jan. 24th.

SUTTON v. CLARKE.

MR. Serjeant *Jones*, on a former day, obtained a rule *nisi* to set aside for irregularity a judgment signed by the defendant under the following circumstances:—The defendant was arrested in *September*, 1831, for a debt of 101*l.* On the 27th of that month, he took out a summons for particulars of the plaintiff's demand. On the 18th *October*, particulars were delivered; but being deemed too general, a summons for better particulars was obtained, which stood over till the 25th *November*, when a peremptory order was made, requiring the plaintiff to deliver further and better particulars within one week. This order not having been complied with, the defendant's attorney, on the 9th *December*, signed judgment of *non-pros.* The defendant died on the 3rd *December*. The plaintiff had declared as of *Michaelmas* Term.

The Court set aside a judgment of *non-pros.* which had been signed by the defendant for the non-delivery of particulars of the plaintiff's demand pursuant to a Judge's order.

Mr. Serjeant *Ludlow* now shewed cause.—The defendant was entitled to sign judgment of *non-pros.* on the 2nd *December*; and his death on the 3rd did not alter the position of the cause. In *Burgess v. Swayne* (a) Lord *Tenterden* said: "The defendant might have obtained a Judge's order for the delivery of the particulars within a given time; and then, if the particulars were not delivered within the time specified, he might have signed judgment." The omission of the plaintiff to deliver the particulars was therefore clearly a default which entitled the defendant to sign judgment.

(a) 7 Barn. & Cress. 485. The decision in that case was, that a defendant cannot sign judgment of *non-pros.* for not declaring, after an order for particulars of the

plaintiff's demand, with a stay of proceedings till they are delivered, unless the order require that they shall be delivered within a certain time.

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Mr. Serjeant Jones, in support of his rule, was stopped by the Court.

Lord Chief Justice TINDAL.—I think the judgment that has been signed in this case must be set aside; it has been signed prematurely. We cannot give greater effect to the non-delivery of the particulars than to the non-delivery of a declaration. The neglect of the plaintiff to comply with the order could only operate as a stay of proceeding. If the plaintiff had neglected to declare within the proper time, the defendant might have signed judgment.

The rest of the Court concurring—

Rule absolute, with costs (a).

(a) Where a plaintiff omitted to deliver a particular of his demand in obedience to a Judge's order, the Court refused to allow the defendant to sign judgment of *non-pros.* *Somers v. King*, 7 Dow. & Ryl. 125.

Tuesday,
Jan. 24th.

The Mayor and Burgesses of TRURO v. REYNALDS.
SAME v. BASTIAN.

By a charter of the 31st Elizabeth, her Majesty granted to the inhabitants of

T. to be incorporated by the name of "The Mayor and Burgesses of the Borough of T.," and also granted and confirmed to the said mayor and burgesses, and their successors, "all messuages, lands, tenements, customs, privileges, immunities, advantages, &c., within the said borough, which the said mayor and burgesses or inhabitants, by whatever names or name, corporate or incorporate, by reason or colour of any prescription, &c., for fifty years past had held; and that the burgesses and inhabitants of the said borough, and their successors, from thenceforth for ever, should be free from toll, passage, pontage, murage, &c. anchorage, coynage, wharfage, cramage, keyage, &c., for all goods, &c., which were their own, throughout the whole kingdom of England, except the city of London:"—*Held*, that this exemption from tolls and dues did not extend to tolls and duties arising and due by prescription to the corporation of T. within that borough.

DEBT for tolls. The first count of the declaration (a) stated that the defendant, on &c., at &c., was indebted to

(a) The pleadings in both cases were the same in form.

the plaintiffs in divers sums of money amounting in the whole to a large sum of money, to wit, the sum of 50*l.*, for certain tolls due and of right payable to the plaintiffs by the defendant for and in respect of divers goods and merchandizes before that time landed by the defendant from divers ships and vessels, in and upon a certain quay or wharf of the plaintiffs, to wit, at *Truro*, &c., and to be paid by the defendant to the plaintiffs when he the defendant should be thereunto afterwards requested; whereby, &c.

The second count was for goods landed generally; the third, “ for divers other tolls and duties due and of right payable by the defendant to the plaintiffs for divers other goods and merchandizes by the defendant before that time imported into, and divers other goods and merchandizes exported from, a certain port or harbour, to wit, &c.” The fourth count was for tolls generally. The fifth, “ for the wharfage and cranage of divers goods, wares, and merchandizes before that time landed by the defendant in and upon a certain quay or wharf of the plaintiffs, by the sufferance and permission of the plaintiffs, and at his special instance and request, and to be paid by the defendant to the plaintiffs when he the said defendant should be thereunto afterwards requested.” The sixth count was upon an account stated.

The defendant pleaded the general issue.

At the trials before Mr. Justice *Alderson*, at the last Assizes at *Bodmin*, it was agreed that the following documents should be read in evidence, *viz.*—an office copy of a charter of the 31st *Elizabeth* (1589)—an office copy of a surrender of the charter of *Elizabeth*, of the 28th *October*, 1684, and the memorandum of the enrolment, of the 19th *March*, 1685, 1 *Jac.* 2—and an office copy of a proclamation of the 4 *Jac.* 2, for restoring corporations to their antient charters, liberties, rights, and franchises. The

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charter of *Elizabeth*, in as far as it related to the points in issue in the present case, was as follows:—

“ ELIZABETH, by the grace of God, &c., To all to whom these presents shall come, Greeting:

“ Whereas our borough of *Truro*, in our county of *Cornwall*, is an ancient borough, situate upon the sea coast, and included within part of the harbour of *Falmouth*, and the mayor of the said borough is, and hath a long time been called (in common speech as well as otherwise), and been reputed by the name of Mayor of *Falmouth*: And whereas also the harbour of *Falmouth* at present is in decay, and needeth speedy preservation for the holding and entering of ships therein, because great quantities of rubbish have flowed into the same by reason of the continual working of the tinnery, to the great damage of the said harbour: And whereas the said borough of *Truro* is likewise much the worse for the same cause, a ship of thirty tons being now scarce able to come in, whereas ships of one hundred tons could and were wont to come in well loaded to the said borough: And whereas we are given to understand, by the report of many of our loyal subjects, that the inhabitants of the said borough do endeavour by all means to preserve the aforesaid port, by continual cleansing and repairing thereof, that ships coming there may have their wonted course even up to the quay of the said borough, which may henceforth not only conduce to the public benefit of the said borough and inhabitants thereof, but likewise tend much to the increase of our shipping: And whereas our said borough of *Truro* is the principal place where the tin hath been and is usually coined, and from thence transported to other parts, by reason whereof a certain annual custom of at least one thousand marks hath been heretofore yearly paid unto us: And whereas, further, the said burgesses and inhabitants of the said borough of *Truro* have (time out of mind) had, pos-

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seised, and enjoyed divers rights, jurisdictions, franchises, liberties, privileges, customs, usages, and immunities, as well by prescription as by reason and pretence of old charters, concessions, and confirmations, heretofore, as well by *Reginald (a)*, some time Earl of *Cornwall*, and his predecessors, lords of the said borough of *Truro*, as by divers of our progenitors, Kings of *England*, made to the free burgesses of the said borough of *Truro*: And whereas the inhabitants of the said borough, for relief of their losses which they have a long time sustained for want of frequentation of ships laden with goods, wares, and merchandize, to be unladen at the said port, and for other causes before mentioned, have humbly besought us that we would vouchsafe to extend and shew forth our royal favour and bounty to the said inhabitants in this behalf, and that we would vouchsafe, for the better government and improvement of the said borough, to make, reduce, and create the said inhabitants into one corporate and public body: We, therefore, the aforesaid Queen, willing that from henceforth for ever there may be continued one right and undoubted manner of and for keeping the peace, and government of the people therein; and that the said borough, from henceforth for ever, may be and remain a borough of peace and quietness, to the fear of God, and the terror of evil men, and for the reward and encouragement of the good; and that the peace, and all other acts of justice may be there kept without further delay, we do, out of our special grace and voluntary motion, will, ordain, constitute, direct, and grant, and in and by these presents do, for us, our heirs and successors, will, ordain, constitute, direct, and grant, that our said borough of *Truro*, in our said county of *Cornwall*, from henceforth may and shall be a free borough of itself; and that the said inhabitants of the said borough and their successors, from henceforth for ever,

(a) See the charter of *Reginald*, *post*, p. 279.

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may and shall be one corporate and body politic in power and name, by the name of "The Mayor and Burgesses of the borough of *Truro*, in the county of *Cornwall*;" and that they may have a perpetual succession by the said name of the said Mayor and Burgesses of the borough of *Truro*, in the county of *Cornwall*, and one corporate and body politic in power and name. We do really and fully, for us, our heirs and successors, require, make, ordain, and constitute, and by these presents do declare it to be, and that they may and shall be, by the name of Mayor and Burgesses of *Truro*, for all time to come, persons fit and in law capable to hold, purchase, receive, and possess lands, tenements, liberties, privileges, jurisdictions, franchises, and hereditaments, of what kind or nature soever they be, for them and their successors in fee and continually, and also goods and chattels of what nature or kind soever they be: likewise to give, grant, demise, and assign lands, tenements, and hereditaments, and all and singular other things to do and execute by the same name; and that, by the same name of Mayor and Burgesses of the borough of *Truro*, in the county of *Cornwall*, to plead and be impleaded, answer and be answered, defend and be defended, may and shall be able, in all Courts and places whatsoever, and before any Judge or judicaries whatsoever, and other persons and officers of ours, in all manner of suits and complaints, causes, matters, and demands of what kind or nature soever, in the same manner and form as other our liege people in this our realm of *England*, being persons fit and in law capable to plead and be impleaded, to answer and be answered, defend and be defended, may have power and be able.

"And also out of our abundant grace, true understanding, and voluntary motion, we do grant, and by these presents confirm, to the aforesaid mayor and burgesses of *Truro* aforesaid, and to their successors, all and singular the same and such like messuages, lands, tenements, customs,

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liberties, privileges, immunities, franchises, jurisdictions, commodities, and hereditaments whatsoever within the town, borough, or parish of Truro aforesaid, with their appurtenances, which the aforesaid mayor and burgesses of the aforesaid borough, or the inhabitants thereof, by whatsoever name or names, corporate or incorporate, or by whatsoever pretence of any corporation, reason or colour of any prescription, writing, or writings, by the space of fifty years last past, or more, by estate of inheritance, have had, held, used, or enjoyed, or ought to have, hold, use, or enjoy, to have and to hold the said premises of us, our heirs and successors, yielding therefore the antient rent or farm which hath been yearly paid, or ought to be paid heretofore to us and our predecessors, for all other rents, services, tributes, and demands whatsoever theretofore to be yielded; paid, or done unto us, our heirs and successors: and that the said mayor and burgesses of the aforesaid borough, and their successors, may and shall have and be able to have within the said borough, limits, and bounds, and liberties thereof, infangtheif, outfangtheif, sacham, socham, toll, sock, sack, theft-bote, backberindtheif, and ordelf, within the said borough, liberties, and precincts thereof. We have granted likewise to the said mayor and burgesses, and their successors, and to every of them, and, for us, our heirs and successors, do grant that the burgesses of the said borough shall not be put, or any of them placed with men out of their corporation, in any amize juries, attainder, or inquisitions whatever, for any actions, things, or other matters whatsoever depending before our Justices, or other officers of us, our heirs or successors, out of the aforesaid borough of Truro, or limits thereof, except concerning lands, tenements, or other things issuing or to issue within the same borough, or liberties thereof: we do grant also to the said mayor and burgesses of the aforesaid borough, and to their successors, that they shall not be compelled to go or come before any

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justices of the peace, commissioners, ministers, sheriffs, co-cheators, coroners, or before any steward or marshal or clerk of the market of our household or our successors' whatsoever, out of the said borough of *Truro* in anywise, unless it be for treason, murder, felony, or some other matter touching life or limb; *And that the burgesses and inhabitants of the said borough, and their successors, from henceforth for ever may and shall be quit and free from toll, passage, pontage, murage, panage, picage, anchorage, coynage, wharfage, crannage, keyage, stallage, castage, flotage, and tollage, herngeld and scot, for all things, goods, and merchandises, which are their own, throughout the whole kingdom of England, except the city of London, suburbs and liberties thereof; And that they may and shall have power to hold and keep fairs and markets within the said borough, limits and precincts thereof; and to have pontage, keyage, portage, weighage, lastage, anchorage, and culage.*

"We will, and by these presents, also, for us, our heirs and successors, do grant to the aforesaid mayor and burgesses of the said borough, and to their successors, for ever, that they shall freely and peaceably have, hold, exercise, and enjoy the aforesaid grant of ours, together with all and singular their other antient liberties, privileges, jurisdictions, franchisements, common seal, offices, powers, fraternity, nominations, elections, exemptions, customs, usages, prescriptions, courts of markets and fairs, profits of markets and fairs, and all commodities whatsoever belonging or incident thereunto."

The tolls sought to be recovered in the first action were, ten pence, for ten sacks of flour landed by the defendant *Reynalds* at the corporation quay. On the part of the plaintiffs, two antient charters were produced, from the corporation chest at *Truro*, the one, a charter of *Reginald*, Earl of *Cornwall*, without date, but supposed to have been

granted in the second year of *Henry the Second*; the other, a charter of the 13 *Edward 1*; and also an *inspeimus* of the same charter, reciting an *inspeimus* of the charter of 2 *Henry 2*. The charter of *Reginald*, Earl of *Cornwall*, was as follows:—

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“Reginald Fitzroy, Earl of Cornwall—To all the barons of Cornwall, and all knights, and all free tenants, and all men, as well English as Cornish, Greeting: Know ye that I have granted to my free burgesses of Triverien all free and municipal customs, and the same in all things which they had in the time of Richard de Lacey, to wit, sac and soc, and thol and theam, and infangenethef: and I have granted to them that they do not plead in hundred courts nor in county courts, nor for any summons go to plead elsewhere without the town of Triverien; and that they be quit of giving toll throughout all Cornwall in fairs and markets, and wheresoever they buy and sell; and that, of their money lent and not restored, they take distress in their town of their debtors.”

Old books were also produced from the corporation chest, containing acts or lettings by the corporation of the tolls or quay dues for certain rents, in regular succession from the year 1687 to the year 1713, with the exception of the period intervening between the years 1692 and 1703, where the evidence was wanting. Proof was also given of various surveys and biddings for the quay dues, at intervals, from the year 1730 to the year 1824; and also of receipts for poor-rates in respect of the quay dues, given to the town steward in the years 1701, 1702, and 1703. The lessee of the tolls in 1824 also proved the payment of poor-rates in respect of these dues.

The quay masters from 1801 to the present time were called, and they proved the payment of the toll in question without objection down to the year 1830. One of these

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witnesses proved that the defendant was an inhabitant of *Truro*; that the flour in question was landed on the quay; and that the customary toll was demanded and refused.

Several inhabitants of *Truro* were also called on the part of the plaintiffs, who proved the payment by themselves and others of the dues claimed from the year 1782 up to the present time. It appeared that about one fifth of the whole dues was received from strangers; all the rest being paid by the inhabitants of *Truro*.

It also appeared that the quay and adjoining land belonged to the corporation; and that the quay, &c., were repaired and kept by them.

On the part of the defendant, it was submitted that the plaintiffs ought to be nonsuited, on the ground that they had not proved their right to sue in a corporate character. The learned Judge, however, refused to stop the cause upon this objection. It was then contended, that, by the language of the charter of *Elizabeth*, the inhabitants of *Truro* were exempted from the payment of all tolls in every place throughout the kingdom except *London*, and therefore that they were not liable for tolls in *Truro*.

On the part of the plaintiffs, it was insisted that the supposed exemption in the charter could not apply to pre-existing tolls, and that it was improbable that the charter would have been accepted subject to such an exemption: and they relied on the prescriptive right established by the evidence.

The learned Judge left it to the jury to say whether they were satisfied from the evidence that the corporation had been accustomed to take the toll in question from all time: telling them, that, if they could not see any rational ground for presuming a time when this usage commenced, it might be referred to a legal origin; that, if there had been a preceding grant of tolls, and the charter of *Elizabeth* had exempted the inhabitants of *Truro* from payment

of these tolls, such exemption was illegal, for that Queen *Elizabeth* could not derogate from the grant of a preceding King—she could only grant an exemption from something that she by the charter gave; that, whatever might be the true construction of that charter, the best criterion was the usage of those days; and that, if the jury were satisfied, from the usage of 194 years, that the toll in question had been taken from all time, the verdict must be for the plaintiffs; but that, if they were satisfied that it commenced after the time of legal memory, then the verdict must be for the defendant.

The jury found a verdict for the plaintiffs—damages, ten pence.

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The tolls sought to be recovered in the second action were, sixpence for a butt of currants, and four pence for a hoghead of molasses, landed on the corporation quay.

The documentary evidence offered on the former trial was read by consent on the trial of this cause, and several witnesses, collectors of the tolls, and also inhabitants of the borough of *Truro*, as well as of the adjacent streets of *Kewynn* and *St. Clement's*, were called to prove that they had always paid for currants and molasses the tolls claimed in this instance.

On the part of the defendant, several witnesses were called to prove variations in the charges made for tolls by the various collectors, upon persons who had landed goods on the corporation quay; and amongst others, one who had been collector of the dues from the year 1815 to the year 1824. He stated, that he commenced on the 25th *December*, 1815, to collect the dues upon all goods as they were in the course of being landed at the quay, such as former quay masters had been in the habit of collecting; that, soon after, he asked the town steward to give him a tariff to collect by, when the town steward desired him to get accounts of the charges for quay dues at other places; that he obtained them accordingly from *Penzance* and *Falmouth*, and

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delivered them to the town steward, and pointed out to him the difference between them; that the town steward desired him to arrange a list or tariff of all the articles alphabetically, which he accordingly did, and the charges were affixed to each article by the town steward; that the inhabitants refused to pay those charges; that a meeting was held of the trade of *Truro*, and a committee appointed; that he (witness) attended such meeting by order of the town steward, when certain variations were pointed out to him in the charges contained in the new tariff, as compared with the old one which he produced to the committee; that, in consequence of this meeting, the town steward prepared another tariff, with the alterations proposed by the committee; and that he (witness) acted under the higher tariff for the space of three months, always collecting the higher rate of duties whenever he could get it.

With respect to "anchorage," it appeared from a tariff dated 1792, that all vessels, except coal ships or empty vessels, paid for anchorage four pence; and that, if the owners of a barge or boat belonged to *Truro*, they paid no anchorage. But there was evidence that the inhabitants paid anchorage dues for vessels laden with merchandize.

The objection taken in the former case to the right of the plaintiffs to sue in their corporate character was again urged, and overruled by the learned Judge.

It was then contended, on the part of the defendant, that the variations proved in the charges for quayage, &c., destroyed the plaintiffs' right, inasmuch as it was thereby left in uncertainty.

On the other hand, it was suggested (and proved by a witness, one of the collectors) that the variations complained of were mere clerical errors.

The learned Judge summed up in terms similar to the summing up in the former case; and, as to the alleged variations, said that they might be ascribed to mistake, and consequently did not in any manner affect the prescriptive right enjoyed by the mayor and burgesses: and he left it

to the jury to say, whether, from the whole of the evidence, they were satisfied that the corporation of *Truro* had received from all time the toll now claimed of sixpence a butt for currants, and fourpence a hogshead for molasses.

The jury found in the affirmative, and accordingly returned a verdict for the plaintiffs—damages, ten pence.

Mr. Serjeant *Merewether*, on the part of the defendants, in the last *Michaëlas* Term, obtained rules *nisi* that these verdicts might be set aside, and new trials had, on the grounds of misdirection by the learned Judge, and that the verdicts were against evidence.—He submitted that the charter of *Elisabeth* exempted the inhabitants of *Truro* from all tolls and duties as well within the borough as without, except in the time of fairs and markets held in the borough; and that the variations in the amount of quayage taken at different times destroyed any prescriptive right, for that, to support a prescription, the usage must be uniform.

He also moved for a nonsuit, on the ground that the plaintiffs had produced no evidence to shew that they were a corporation; but the Court refused to grant the rule upon this point.

Mr. Serjeant *Wilde* now shewed cause.—The evidence, and the finding of the jury thereon, are conclusive as to the perception by the plaintiffs of the dues claimed by them by prescriptive right. The only question that now arises is upon the construction of the charter of *Elisabeth*, *viz.* whether that charter is to operate in exemption of the inhabitants from tolls and dues which are shewn to have been enjoyed by the corporation for a period of nearly two hundred years. That the quay existed anterior to the charter, is clear from the language of that document. It recites “that the inhabitants of the said borough do en-

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deavour by all means to preserve the aforesaid port, by continual cleansing and repairing thereof, that ships coming there may have *their wonted course even up to the quay of the said borough.*" It further recites that "the said burgesses and inhabitants of the said borough of *Truro* have (*time out of mind*) had, possessed, and enjoyed divers rights, jurisdictions, franchises, liberties, privileges, customs, usages, and immunities, as well by prescription, as by reason and pretence of old charters, concessions, and confirmations, &c., made to the free burgesses of the said borough;" and then, after erecting the borough into a corporation by the name of "*The Mayor and Burgesses of Truro, in the County of Cornwall,*" it confirms "to the aforesaid mayor and burgesses, and to their successors, all and singular the same and such like messuages, lands, tenements, customs, liberties, privileges, immunities, franchisements, jurisdictions, commodities, and hereditaments whatsoever within the town, borough, or parish of *Truro* aforesaid, with their appurtenances, which the aforesaid mayor and burgesses of the aforesaid borough, or the inhabitants thereof, by whatsoever name or names, corporate or incorporate, or by whatsoever pretence of any corporation, reason or colour of any prescription, writing, or writings, by the space of fifty years last past, or more, by estate of inheritance, have had, held, used, or enjoyed, or ought to have, hold, use, or enjoy." If a usage is proved to have existed uninterruptedly for a long period, it must be referred to a legal origin. In the present case there was nothing to repel the presumption that the tolls in question had a legal origin. On the contrary, the charter of *Reginald, Earl of Cornwall*, grants them tolls; and the evidence produced in the cause shewed a letting of these tolls by the corporation so early as forty-seven years after the date of the charter of *Elizabeth*.

The clause exempting the inhabitants of *Truro* from the payment of toll, passage, pontage, murage, wharfage, quay-

age, &c., throughout the whole kingdom (except *London*), could not be intended as an exemption of the inhabitants from the tolls and duties necessary to the keeping up their own bridges, walls, quay, &c. The payment is for their own benefit; and, if they are exempted, how are the corporation to find means to support the quay? The evidence shewed that four fifths of the dues were collected from the inhabitants.

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Where the words of a charter are doubtful or ambiguous, they may be explained by long usage—*Blankley v. Winstanley* (a). Lord *Kenyon* there said (b): “It is clear that the usage alone would not prevail against the express provisions of the charter; but, in this as in other cases, contemporary and continued usage is a good guide for the construction of it.” In *Chad v. Tiled* (c), in support of a claim for wreck, the plaintiff proved a grant of wreck from *Henry the Second* to the abbey of *C.*, by all their lands upon the sea, confirmed by *inspeximus* by *Henry the Eighth*, and a subsequent grant by him of the island of *B.* and its shores, belonging to the late abbey of *C.*, supported by evidence, that, between forty and fifty years ago, the proprietor of the island of *B.* raised an embankment across a small bay, and had ever since asserted an exclusive right to the soil, without opposition—it was held, that, although the usage of forty years’ duration could not of itself establish such exclusive right, or destroy the rights of the public; yet that it was evidence from which prior usage to the same effect might be presumed, and which, coupled with the general words contained in those grants, served to establish such right. *The Attorney-General v. Parlier* (d), *Withnell v. Gartham* (e), *Lowden v. Hierona* (f),

(a) 3 Term Rep. 279.

(d) 3 Atk. 577.

(b) 3 Term Rep. 286.

(e) 6 Term Rep. 396.

(c) 5 J. B. Moore, 185; S. C.

(f) 2 J. B. Moore, 102.

2 Brod. & Bing. 403.

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Rex v. The Mayor, &c., of West Looe (a), *The Corporation of Stamford v. Pawlett* (b), and *Rex v. Grou* (c), are also authorities to shew that contemporary usage is the best interpretation of antient charters and statutes. In *Norton v. Hammond* (d) it was held, that, in order to support a general exemption *in non decimando*, it must be shewn that the lands were part of the possessions of a monastery before the time of legal memory, but it is seldom that such fact can be distinctly proved, and therefore it must usually depend upon presumptive evidence. Lord Chief Baron *Alexander* there said (e): "The abbey is stated to have been founded in 1182, in the reign of *Henry 1st*, by *Thurstan*, Archbishop of *York*. There is a charter of *Richard 2nd*, in the 19th year of his reign, conceding and confirming to the monks lands in an almost endless variety of places; among others, *Arncliffe* and *Arncliffe Cote*. Now, when we have such authentic evidence, that, ten years only after the commencement of legal memory, the monks were in possession of these places, it is no unjust or unreasonable presumption, that they were in possession prior to that era, when that supposition is necessary, to justify and legalize the usage that appears to have prevailed uniformly in after-times."

All clauses of exemption are to be construed strictly. *Rolle's Abridgment* (f). *Viner's Abridgment* (g).

The alleged variations in the tolls received by the lessees of the corporation cannot in any degree interfere with their prescriptive right.

Mr. Serjeant *Mercwether*, in support of his rule.—Two questions arise in this case—*first*, whether the evidence

(a) 2 Dow. & Ryl. 178; 5 Dow. & Ryl. 590; 3 Barn & Cress. 677.
 (b) 1 Crompt. & Jervis, 57.
 (c) 1 Barn. & Adolph. 103.
 (d) 1 Younge & Jervis, 94.

(e) 1 Younge & Jervis, 104.
 (f) Vol. 2, p. 202—title "Prerogative le Roy," (Z).
 (g) Title "Toll," (E. 9.), pl 20.

given on the part of the plaintiffs sufficiently established the prescriptive right they laid claim to—*secondly*, whether, by the charter of *Elisabeth*, the inhabitants were or were not exempted from the payment of toll within the borough of *Truro*.

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Upon the first point the jury were misdirected by the learned Judge. It was left to them, in substance, to say whether the evidence satisfied them that the plaintiffs and their predecessors had from all time enjoyed the tolls claimed: whereas there was no evidence of any perception of toll by them anterior to the charter of *Elisabeth*. The acceptance by the inhabitants of that charter operated as a virtual surrender of all pre-existing rights. They took the grant subject to the exemption of the burgesses and inhabitants from payment of all tolls and duties.

[Lord Chief Justice *Tindal*.—If the inhabitants are to be exempted from tolls, how is the quay to be maintained?]

From the dues received of strangers, and from those arising in the fairs and markets which the charter empowers them to hold, or the corporation may possess other funds applicable to the purpose. The charter itself negatives the existence of any prescriptive right. And all the evidence of usage was subsequent to that grant. The evidence also shewed that the inhabitants of *Truro* were exempted from anchorage, and the words anchorage and keyage occur in the same sentence in the charter.

It has been said that clauses of exemption are to be construed strictly: but that only applies as between the King and a subject, not as between subject and subject. In *Warrington v. Mosely* (a), it was held that a prescription generally for toll of all goods brought within the limits of a certain manor, was bad; for that every prescription to charge the subject with a duty must impart a benefit, or shew a reason why it is claimed.

(a) 4 Mod. 319.

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In the present case the proof of usage was equivocal and ambiguous, and ought not to be allowed to prevail against the express words of the charter. The variations in the charges were by the learned Judge ascribed to mistakes; but the new tariff which the corporation in 1815 attempted to impose upon the inhabitants clearly could not be ascribed to mere mistake.

Lord Chief Justice TINDAL.—After the full investigation that this case has already undergone by one jury, I think there is no necessity for submitting it to the consideration of another. The question in the first case is, whether or not the plaintiffs have established their right to take a toll of one penny *per sack* for flour landed at the quay of *Truro*. This supposed right is grounded on prescriptive usage. Let us see whether or not it is supported by the evidence.

The first branch of the evidence clearly established, for a period of forty or fifty years, and, indeed, as far back as the memory of living witnesses reached, the actual payment of the toll of one penny for every sack of flour landed on the quay, without exception, by the inhabitants and burgesses of *Truro*, as well as by strangers. There was also evidence adduced of receipts by collectors (since deceased), given at a period long antecedent to living memory, for quayage. Still further back, from the year 1637, until the year 1800, we find various biddings for and leases granted by the corporation of the antient quay duties; and other similar documentary evidence; the whole establishing a regular series of prescriptive usage: and the parol evidence in the cause defined the nature of the duties taken. To hold such evidence insufficient to support a prescriptive right would tend to weaken the security afforded to men's rights by long-established usage.

Then, as to the charter of the 31st *Elizabeth* (1589)—It is admitted, that, if that charter were accepted by the

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corporation, and it contained an explicit renunciation or abrogation of privileges which they before enjoyed, they must take the burthen as well as the benefit or advantage it bears with it: but I do not perceive that the charter contains any renunciation of the previously existing quay duties, either by express words or by necessary implication. Even if the renunciation were a matter involved in doubt, the receipt of the duties up to and since the year 1637, would afford strong ground for interpreting the charter rather in affirmance than in denial of the antient prescriptive right: and one cannot reasonably imagine that any inhabitant of the borough would have burthened himself with a rent for tolls which by their charter the corporation had no right to impose. Upon the charter itself, however, I perceive no room for doubt. It begins with reciting that the borough of *Truro* was an antient borough; which would in a legal sense imply a borough by prescription. The charter then confirms to the mayor and burgesses, and their successors, all messuages, lands, tenements, customs, privileges, immunities, advantages, &c., within the said borough, which the said mayor and burgesses, or the inhabitants, by whatever names or name, corporate or incorporate, by reason or colour of any prescription, &c., for fifty years past had held.

Then comes the first clause of exemption upon which the defendant relies—"That the burgesses and inhabitants of the said borough, and their successors, from thenceforth for ever, should and might be free of toll, *passage, pontage, murage, panage, picage, anchorage, coynage, wharfage, eramage, keyage, stallage, castage, flitage, and tollage, herngeld and scot, all things, goods, and merchandizes, which are their own, throughout the whole kingdom of England, except the city of London, suburbs and liberties thereof.*" It is contended that this amounts to an exemption of the inhabitants of *Truro* from all duties within the borough. The first impression, upon

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looking at these words, would naturally be, that the sovereign by whom the charter was granted intended thereby to exempt the inhabitants from all duties, to the payment of which they had been liable antecedently to the grant: but, although the words are general, “throughout the whole kingdom of *England* except the city of *London*,” yet, upon an attentive consideration of the words of the charter, it is manifest that it was not intended to apply to duties payable within the borough. The burgesses and inhabitants are exempted from toll for *passage*; that must mean, for passing over the lands of others, for, there would be no need to free them from toll for passing over their own land. Then, they are to be exempted from *pontage*—a toll levied for the repair of bridges: now, it might be reasonable to exempt the inhabitants of *Truro* from charges for repairing bridges at *Exeter* or elsewhere; but not from the charge of keeping up their own bridges. They are further to be free of *murage*—which is a rate levied for the repair and keeping up of the walls of a town, a charge necessarily imposed upon the inhabitants. To say that the inhabitants of *Truro* were by this grant to be exempted from the charge of repairing and maintaining their own walls, would be to say that Queen *Elizabeth* intended that the walls should fall into decay. The same remarks will equally apply to the exemption from anchorage, wharfage, crantage, keyage, &c.; for, finding as we do that the former words in the same sentence do not necessarily apply to the borough of *Truro*, we may fairly construe the latter words in the same sense, and hold them also to apply to other places than *Truro*. I therefore think that the clause in the charter granting these exemptions was not intended to embrace that borough.

The second clause under which the defendant claims exemption from payment of the tolls in question is as follows:—“And that they (the burgesses and inhabitants of

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Truro) may and shall have power to hold and keep fairs and markets within the said borough, liberties and precincts thereof, and to have pontage, keyage, portage, weighage, castage, anchorage, and culage." It is contended that, as this licence is confined to fairs and markets, it necessarily implies a negative of a larger prescription. The answer to that argument is, that, if the general prescriptive right be once established, mere words of affirmation in the grant will not take away that right. Grants of this description are usually framed by the parties soliciting them, and they have in this case, *pro majori cautela*, inserted these words as to the fairs and markets which are supposed to operate restrictively: but such words have never been held sufficient to cut down an antecedent right found by a jury.

Again, as to the anchorage dues, it has been contended that, by the tariff of duties, no duty for anchorage was payable by the inhabitants. Let us see how far this is borne out by the evidence. It was proved that these dues were paid by the inhabitants upon all ships laden with merchandize; and that only vessels not laden were exempted from them. The grantees might, undoubtedly, relinquish part of the duties where they found them burthensome; and, as it was probably conceived that anchorage dues upon empty vessels were burthensome, those dues seem by common consent not to have been demanded: but still it leaves the original right untouched.

This disposes of the first case. It would be idle to send the cause down again, as it was properly left to the jury to say whether or not the prescriptive right which the plaintiffs claimed existed before the charter. They found that it did, and we are not dissatisfied with the verdict.

The second case rests upon the same foundation, except that the quay dues were claimed for currants and molasses, and the defendant relied upon alleged variations in the amount of the toll collected: but it was left to the jury

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to say whether the variations did not arise from mistake, and they found that they did. As, therefore, the question in this case also was properly left to the jury, and decided by them to our satisfaction, I think the rule for a new trial should be discharged.

Mr. Justice PARK.—I am of the same opinion. In support of the prescription there is a strong and uniform course of usage from 1637 to 1828; and there was some evidence carrying the usage even further back: and it was supported by the testimony of living witnesses. The evidence gives a legal origin to the custom, and it is not in itself improper or unreasonable; for, what can be more reasonable than that the corporation should repair and maintain the quay and the streets of the borough, and that they should be empowered to levy tolls to defray the expenses? It is said that the corporation may have other funds applicable to these purposes; but there is no evidence on that subject. On the part of the defendant we are required to suppose the charter of *Elisabeth* to be the foundation of the rights of the corporation. It was, however, only a confirmation of them. The payment of the dues claimed was proved to have been made so early as the year 1637, and the usage is continued uninterruptedly and uniformly up to the year 1674. The survey of 1672 speaks of the quay dues as dues “antiently gotten.” The term “antient” could hardly apply to so short a period back as the argument supposes. Besides, the charter of *Elisabeth* itself speaks of the *antient* course *ad clavem*. There is a distinction between quay dues, and duties for anchorage; and there might be good reason for allowing exemptions in certain cases from anchorage dues; the harbour might need no repairs.

I fully concur with my Lord Chief Justice in the construction he has put upon the clause of exemption contained in the charter. It would be gross absurdity to sup-

pose the inhabitants exempted from all duties and services to the corporation. They are exempted from the charge of repairing the bridges and walls of other towns, but they must necessarily be bound to maintain their own. The special exception of the city of *London* does not properly lead to the inference supposed.

Upon the second case, the question was so fully and clearly submitted to the jury, that I see no ground for disturbing their verdict.

Mr. Justice BOSANQUET.—I am also of opinion that the rules in both cases should be discharged. Two questions have been raised for the consideration of the Court—*first*, as to the prescriptive right to the quay duties claimed by the corporation—*secondly*, upon the construction of the charter of *Elizabeth*.

The first question was one of fact only. It was properly left to the jury to say whether the duties in question were due to the corporation by prescriptive right before the charter of *Elizabeth*. They found that they were. The evidence was extremely strong, shewing the receipt of the dues by the corporation for a period little short of two hundred years. Upon the second case there was some trifling variation in the amount of dues collected; but that also was brought under the consideration of the jury, and properly disposed of by them.

With respect to the charter of *Elizabeth*—if the expressions from which it is sought to infer an exemption of the inhabitants from the payment of all tolls and duties within the borough, were unequivocal, and the charter was accepted by the corporation, it must be taken to have been accepted by them, subject to such exemptions, and they would be bound by them. The only question, therefore, is, whether the language of the charter is so clear and unequivocal as to control and override the prescriptive usage which the jury have found to have been immemorial

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and contemporaneous with the charter: if the language is equivocal, it is for the Court to put a construction upon it. The construction contended for on the part of the defendants is most unreasonable—that the inhabitants of *Truro* are to levy tolls and duties from the whole kingdom, for repairing and maintaining their quay, &c., and that they themselves shall not be bound to contribute at all. The exception, it is said, pervades the whole grant to the corporation. It is but reasonable to suppose that the charter intended to exempt the inhabitants of *Truro* from payment of duties elsewhere; but, it would be most unreasonable to suppose an intention to exempt them from the payment of duties to the corporation of *Truro*, to enable them to repair their quay, &c. I therefore think the charter was not intended to apply to the duties for quays, &c., in the borough of *Truro*; but that they must be borne as they were before the charter. Some stress has been laid in the argument on the clause as to fairs and markets within the borough of *Truro*, and it has been contended that the liability of the inhabitants to the duties of pontage, quays, &c., is confined to the time of holding such fairs and markets. This part of the charter has been fully commented upon by the Lord Chief Justice; and I fully concur with him in the construction he has put upon it. If the prescriptive right claimed by the plaintiffs in this case was in the corporation before the grant of the charter of *Elizabeth*, words merely affirmative of a right of a more limited description will not deprive them of their former rights. The words were introduced by way of greater caution only.

Mr. Justice ALDERSON.—I fully concur with the rest of the Court in the judgment they have pronounced. At the trials, I thought the cases free from doubt, and I have since seen no reason for altering the opinion I then formed.

In the first case, the question was whether there was any

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prescriptive usage authorizing the corporation to demand and take one penny for every sack of flour landed at the quay of *Truro*. The right was proved to have been exercised as far back as the memory of living witnesses could go. No variation was even suggested. The documentary evidence in support of the usage was carried so far back as the year 1637. I left it to the jury to say whether or not, upon this evidence, they could infer a custom by the corporation to take the toll in question so far back as the year 1637; and I told them, that, if there had been an uninterrupted usage to that effect for so long a period as from that time to the present, they might infer that the usage had a legal origin. They found in the affirmative.

The charter of *Elisabeth* does not interfere with this usage. And as to the duties to be collected at the fairs and markets within the borough, the charter clearly does not confine the collection of dues to those periods, for it is admitted that strangers are liable to quayage at all times.

In the second case the only question was, whether there had been a variance in the assertion of the right in modern times. The only evidence as to this was that of a witness who produced a document of which he could give no rational account. His credit was left to the jury. It appeared that there were four slight variations in a list of one hundred and fifty charges; and the variances applied exclusively to matters not now before the Court. There were likewise some inconsistencies in some accounts of the collectors of the dues produced by the defendant; but there could be no doubt as to their being mere clerical errors. If these variations were not referable to mistake, it is impossible to infer that there was fraud on the part of the corporation; for, the charges in question were inconsistent with their present claims. It further appeared, that, in the year 1815, an attempt had been made to establish a new tariff of dues. The corporation seem not to have been parties to this attempt: it was done by the collectors.

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This tariff was presented to the inhabitants; the latter refused to pay the new dues; and, at a meeting which was called to consider the subject, the old tariff was produced, and the antient duties adopted. That was strong presumptive evidence in favour of the antient tolls or dues. The whole case was left to the jury; I observed upon the substance of the variances relied on by the defendant; and I told the jury, that, if it were established that there was an antient toll of right payable to the corporation, a slight variation in the collection of it in modern times was not sufficient to destroy it altogether. The jury returned a verdict affirming the antient toll; and I am not dissatisfied with their verdict, which I should have been, had it been the other way.

Rule discharged.

Tuesday,
 Jan. 24th.

The rules of
Trinity, 1 *Will.*
 4, as to bail, ap-
 ply equally to
 town and coun-
 try bail.

ANONYMOUS.

MR. Serjeant *Bompas* opposed the justification of bail in this (a country) cause, on the ground that the notice of bail did not, in conformity with the rule of *Trinity* Term, 1 *Will.* 4 (a), state the residence of the proposed bail during the last six months; and also on the ground that the affidavit of justification omitted to negative the deponents' being bail in any other action, or to specify the several actions in which they were bail; and also omitted to describe the nature and value of the property in respect of which the bail proposed to justify.

Mr. Serjeant *Andrews*, *contra*, submitted that the rule in question was not intended to apply to country bail, the only object in requiring the parties to swear that they are not bail in any other cause, or, if they are so, to specify

(a) Rule 2—5 Moore & Payne, 813.

the several instances, being, to shew whether or not they are hired bail.

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PER CURIAM.—The first rule of *Trinity Term*, 1 *Will. 4*, expressly mentions both town and country causes; and the second speaks of bail *generally*; that must apply to every bail. The notice is not sufficient.

Bail rejected.

CANTWELL v. The Earl of STIRLING.

Wednesday,
Jan. 25th.

THIS was an action of *assumpsit* on a bill of exchange.

The defendant pleaded as follows:—

“ And the right honorable *Alexander*, Earl of *Stirling* and *Dovan*, of that part of the United Kingdom of *Great Britain* and *Ireland* called *Scotland*, whom the said plaintiff by his said declaration admits to be Earl of *Stirling* and *Dovan*, but alleges that he the said plaintiff sued out his original writ against him as *Alexander Humphreys Alexander*, calling himself Earl of *Stirling*, and against whom the plaintiff has thereupon declared as the Right Honorable *Alexander Alexander*, Earl of *Stirling* and *Dovan*, *having privilege of parliament*, comes and defends the wrong and injury when &c., and prays judgment of the same writ and declaration thereon founded, because he says that he now is, and before and at the time of suing out the said writ was, and from thence hitherto hath been (a), Earl of *Stirling* and *Dovan*, of that part of the United Kingdom of *Great Britain* and *Ireland* called *Scotland*, and entitled to, and has and had privilege of peerage; but he further says that he has not, nor had he on the day of suing out the said writ, or at any time hitherto, privilege

To a declaration against the defendant, describing him as the right honorable *A. A.*, Earl of *S.*, *having privilege of parliament*, the defendant pleaded in abatement, that he had privilege of peerage, but not privilege of parliament:—*Held*, ill on demurrer, for that the words in the declaration, “ *having privilege of parliament*,” were immaterial and unnecessary, and might be rejected as surplusage.

(a) See *Digby v. Alexander*, post, *Easter Term*.

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of parliament, as by the said declaration is above supposed; and this he is ready to verify; wherefore he prays judgment of the said writ and declaration thereon founded, and that the same may be quashed."

To this plea the plaintiff demurred; and the defendant joined in demurrer.

The demurrer now came on for argument.

Mr. Serjeant *Mercwether*, in support of the demurrer.—The plea is imperfect, for it ought to shew how the defendant became a peer. It is also bad for duplicity—averring affirmatively, that the defendant is Earl of *Stirling* and has privilege of peerage, and negatively, that he has not privilege of parliament: thereby tendering two distinct issues. The allegation in the declaration that the defendant has privilege of parliament is mere matter of description, which was altogether unnecessary and immaterial, forming no part of the proper name and title of the defendant, and consequently may be rejected as surplusage. Besides, the defendant by his plea prays judgment of the writ and declaration, without having cravedoyer of the writ.

The Court called upon—

Mr. Serjeant *Spankie*, to support the plea.—The only substantial question is, whether the allegation in the declaration of the defendant's having privilege of parliament, is material or not. The statement in question is analogous to a misdescription in a name or title: the privilege assigned to the defendant is one below his rank and dignity. In *Comyns's Digest* (a) it is laid down that "a defendant may plead in abatement if his name of dignity be omitted or mistaken. So, if the defendant has a name of dignity given to him, when he has no such dignity, it may be pleaded in abatement; as, if he be named knight and baronet when he is not a baronet, or when he is not a knight (b)."

(a) Title "Abatement," (F. 19.).

(b) 1 Vent. 154.

Lord Chief Justice TINDAL.—The defendant has been impleaded by his proper name of dignity, as Earl of *Stirling*, and is brought into Court by the proper process, *viz.* by original writ and summons. He does not complain of the mode in which he has been brought into Court, or of the name by which he has been impleaded; but he complains that he is described as having privilege of parliament, instead of privilege of peerage. The validity of the objection depends upon whether or not either set of words is necessary, or whether, if erroneously inserted, they may not be rejected as surplusage. I am clearly of opinion that the words “having privilege of peerage” need not be inserted in the declaration, and that the words here used, “having privilege of parliament,” being contrary to the fact, and unnecessary, may be rejected. The law has provided that parties shall be described by their proper names and titles of dignity, and an omission to describe a defendant by his true Christian or surname, or by his proper title of dignity, enables the defendant to take advantage of the mistake by a plea in abatement, shewing his proper name and title. But here the defendant is described correctly by his title, and all that he complains of is a misstatement in a mere matter of immaterial addition. In *Comyns's Digest* (a) the rule is laid down thus: “If the defendant be named *A. B.*, of *P.*, he may say that he is *A. B.*, of *D.*, and not of *P.* So, if he be named *A. B.*, smith, he may say he is *A. B.*, carpenter, and not smith. But, if the addition be immaterial, a mistake cannot be pleaded in abatement: as, in an action against *A. B.*, citizen of *Y.*, one of the company of *M.*, it is no plea that he was not one of the company; or against *J. M.*, attorney of *Peter de Medecis*, it is no plea that he is not his attorney; or, against *A. M.*, *dominam de B.*, when she is not a lady.” In the present case the matter objected to is mere idle de-

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(a) Title “Abatement,” (F) pl. 22.

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scription, and is perfectly immaterial; the party is sufficiently distinguishable without it. The words "having privilege of parliament" may therefore be thrown out of the record.

Mr. Justice PARK concurred.

Mr. Justice BOSANQUET.—It was not necessary to state in the declaration whether the defendant had or had not privilege of parliament. Those words are perfectly immaterial. The defendant is properly described as to his title of dignity.

Mr. Justice ALDERSON.—The question is whether the words objected to are part of the name of the defendant, or merely descriptive of character. Upon that point the authority of *Comyns* is decisive.

Respondet ouster (a).

(a) *Vide post*, p. 365.

Wednesday,
Jan. 25th.

ANTHONY v. JOHN HANEY, JAMES HANEY, and JOSEPH
HARDING.

In trespass for breaking and entering the plaintiff's close, the defendant pleaded that he was the owner of a certain barn, &c., then standing and being in and upon the close of the plaintiff in which &c., wherefore he entered to pull down, remove, and take them away, &c.:—*Held*, ill, on demurrer, the plea not shewing how the barn, &c., came upon the close of the plaintiff, or that they were not attached to the freehold.

THIS was an action of trespass. The first count of the declaration stated that the defendants, on the 8th November, 1830, and on divers other days and times between that day and the day of the commencement of this suit, broke and entered the plaintiff's close at *Much Haddon*, in the county of *Hertford*, and, with feet in walking, trod down,

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trampled upon, and consumed and spoiled the plaintiff's grass, and, with cattle and the wheels of divers carts, &c., crushed, damaged, and spoiled other grass, and with the feet of the cattle and the wheels of the carts subverted, &c., the earth and soil of the said close, and then and there put, placed, and laid down divers quantities, to wit, five thousand bricks, &c., in and upon the said close, and kept and continued the same without the leave or licence and against the will of the plaintiff, and thereby greatly incumbered the said close, and pulled down, prostrated, and destroyed one barn, three outhouses, and three leantos of the said plaintiff, and in so doing dug up and subverted the earth, and made divers holes therein, and seized, took, and carried away the materials of the said barn, outhouses, and leantos.

The second count was for seizing, taking, and carrying away a cart and divers goods and chattels of the plaintiff: and the third, for breaking and entering a certain other barn, outhouses, &c., of the plaintiff.

The defendants pleaded—*first*, the general issue—*secondly*, that, before and at the said times when &c. in the said first count of the said declaration mentioned, the defendant *John Haney* was the owner of and entitled unto a certain barn, three outhouses, and three leantos, and divers goods and chattels, to wit, 10,000 bricks, 10,000 tiles, 5,000 planks of wood, 5,000 joists, 5,000 ties, 5,000 girders, 5,000 pieces of wood, 5,000 loads of timber, and 1,000 weight of iron, of great value, to wit, of the value of 200*l.*, then respectively standing and being in and upon the said close of the said plaintiff in which &c., wherefore the said defendant *John Haney*, in his own right, and *James Haney* and *Joseph Harding*, as the servants of the said *John Haney*, by his command, at the said several times when &c. in the said first count mentioned, entered into and upon the said close in which &c., in order to pull down, remove, take, and carry away the said barn, outhouses, and lean-

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tos, and to take and carry away the said goods and chattels, and did then and there pull down the said barn, outhouses, and leantos, and did take and carry away the materials thereof, and the said goods and chattels, in the said carts, wagons, and other carriages drawn by the said cattle, from and out of the said close in which &c., and, in so doing, they, the said defendants, at the several times when &c. in the said first count mentioned, did necessarily and unavoidably with their feet in walking a little tread down, trample upon, consume, and spoil a little of the grass there then growing and being, and did, with the wheels of the said carts, wagons, and other carriages, a little crush, damage, and spoil other the said grass there also growing, and with the feet of the said cattle, and with the wheels of the said carts, wagons, and other carriages, did a little subvert, damage, and spoil the earth and soil of the said close, and did necessarily and unavoidably put, place, and lay in and upon the said close in which &c. the said bricks, tiles, wood, and rubbish in the said first count mentioned, being part of the materials of the said barn, outhouses, and leantos, and there keep and continue the same for a short time, to wit, until the same should be put in the said carts, wagons, and other carriages, to be removed from the said close, doing no unnecessary damage to the said plaintiff on the occasions aforesaid, as they lawfully might for the cause aforesaid; which are the said several supposed trespasses in the introductory part of this plea mentioned.

The third plea was similar to the second.

The plaintiff joined issue upon the first plea, and demurred generally to the second and third. The defendants joined in demurrer.

Mr. Serjeant *Stephen*, in support of the demurrer, was stopped by the Court, who called on—

Mr. Serjeant *Bompas* to support the pleas.—All the au-

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thorities shew, that, although a party cannot justify entering the *house* of another to recover his goods, yet he may lawfully enter his *close*, provided he can do so without a breach of the peace. If the goods of a party are feloniously stolen, he may pursue and take them wherever he may find them.

[Lord Chief Justice *Tindal*.—The pleas justify the trespass by alleging that one of the defendants was the owner of a certain barn, &c., respectively standing and being on the plaintiff's close, wherefore the defendants entered to remove them. It would seem from that, that the barn, &c., were attached to the freehold. The plea is therefore too large.]

It does not follow that the barn was attached to the freehold; it might have been a *Dutch* barn, standing on pillars; and the plea in effect denies that the barn, &c., were attached to the freehold, as it alleges them to be goods and chattels, and to be the property of the defendant *John Haney*. In *Holdringshaw v. Rag* (a), in trespass for entering into the plaintiff's house and taking of his goods, the defendant pleaded—"quoad the taking of his goods, not guilty; quoad residuum, that the plaintiff was indebted unto him in such a sum; and by license of the plaintiff's servant, the door being open, he entered to demand his debt, which is the same trespass. The plaintiff demurred. Adjudged to be no plea; for, the servant's licence is not to any purpose, and one cannot enter into another man's *house* by colour to demand his debt, especially it being not averred that the master, who was the debtor, was then within the house. But *Gawdy* conceived, that, if it had been averred that the master was then within the house, the plea had been good, as in the case of 19 *Hen. 6*, where one entered into the plaintiff's park to shew him his evidence to avoid a suit between them,

(a) Cro. Eliz. 876.

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it was there allowed to be a good plea." In *Higgins v. Andrews* (a) the distinction is taken between entering a house and entering land. In *Viner's Abridgment* (b) it is said: "If trees are blown down by the wind, it is no trespass to enter the land into which they are blown down to take them." Again (c): "If trees grow in my hedge hanging over another man's land, and the fruit of them falls into the other's land, I may justify my entry to gather up the fruit, if I make no longer stay there than is convenient, nor break his hedge." So, if a man is to lop his tree, and he cannot do it unless it fall upon the land of another, he may justify the felling of it upon the other's land. *Dyke v. Dunstan* (d).

Viner refers to *Miller v. Fandry* (e): "The point singly was but this: I chase the sheep of another out of my ground, and the dog pursues them into another man's land next adjoining, and I chide my dog; and the owner of the sheep brings trespass for chasing them: and it was argued by *Whistler*, that the justification was not good, and he cited *Coke* (f), that a man may hunt cattle out of his ground with a dog, but cannot exceed his authority; and by him an authority in law which is abused, is void in all; and to hunt them into the next ground is not justifiable. But, *per* Lord Chief Justice *Crew*—It seems to me that he might drive the sheep out with the dog, and he could not withdraw his dog when he would in an instant, and therefore it is not like to the case of 38 *Edw. 3*, where trespass was brought for entering into a warren, and there it was pleaded that there was a pheasant in his land, and his hawk flew and followed it into the plaintiff's ground, and there it seems that it is not a good justification, for, he may pursue the hawk, but cannot take the pheasant (g). A

(a) 2 Roll. Rep. 55.

(b) Title "Trespass" (H. a. 2.),
 pl. 11.

(c) Title "Trespass" (L. a.), pl. 6.

(d) 6 *Edw. 4*, 18.

(e) *Latch*, 13; *Popham*, 161.

(f) *Lib. 4*, 38 b.

(g) 6 *Edw. 4*.

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man cuts thorns, and they fall into another man's land, and in trespass he justified for it; and the opinion was, that, notwithstanding this justification, trespass lies, because he did not plead that he did his best endeavour to hinder their falling there; yet this was a hard case. But this case is not like to these cases, for here it was lawful to chase them out of his own land, and he did his best endeavour to recall his dog, and therefore trespass does not lie." The same principles are laid down in *Comyns's Digest* (a), the *Year Book* (b), and also in *Abor v. French* (c), and *Henn's case* (d).

All these cases shew, that, if it be necessary to the securing a man's property, he may justify entering upon the land of another for that purpose. If it were otherwise, the defendant in this case might be left without any remedy for the recovery of his property; for, if he made a demand for them, and the owner of the soil merely disregarded the demand, without committing himself by an actual refusal, there would be no conversion upon which to support an action of trover.

Lord Chief Justice TINDAL.—It appears to me that the second and third pleas in this case cannot be supported in point of law: they are bad on a ground far short of that which has been put in argument. The defendants, in both those pleas, in assertion of their right to enter the plaintiff's close, state, that, before and at the said times when &c. in the first count of the declaration mentioned, the defendant *John Haney* was the owner of and entitled to a certain barn, three outhouses, and three leantos, and divers goods and chattels then respectively standing and being in and upon the said close of the plaintiff in which

(a) Title "Pleader," (3 M. 38),
(3 M. 42).

(b) 19 Hen. 6.

(c) Sir W. Jones, 296.

(d) 11 Rep. 52 a.

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&c.; and thus justify the trespass. I can only understand that statement in this sense, *viz.* that the barn, &c., were affixed to the freehold; for, the justification asserts the defendant's right to enter the close and break up and subvert the soil thereof in order to remove something attached thereto. If such were the fact, the party might bring ejectment, but he clearly cannot justify a forcible entry. The pleas, therefore, being bad in part, are bad altogether; and consequently the plaintiff is entitled to judgment.

We do not, however, decide this case upon so narrow a ground. If the justification only applied to something not affixed to the freehold, the pleas disclose no ground upon which the defendants would be entitled to enter upon the plaintiff's close for the purpose of taking it away. All the cases cited are cases where there has been an implied license to enter upon the soil of another; such a justification has no where been allowed to be set up, except where the circumstances have been stated, to shew how the property was upon the plaintiff's freehold: whereas here the pleas simply allege that the property was there, without shewing how it came there. Where fruit growing in a hedge falls upon the land of another, the owner may justify entering the close to take the fruit. So, if a tree, in consequence of violent wind, or from natural decay, falls upon another's close, the owner of the tree may enter and take it. But, in these cases, the falling of the fruit or the tree are involuntary accidents, to which the owner is in no way accessory, and over which he has no control; and he shews that in his justification. If, however, a tree falls upon the land of a stranger, in consequence of the voluntary act of the owner in cutting it down, he cannot justify entering the stranger's land to take it. It has been said, that, if the goods of a party are feloniously stolen, he may pursue them and take them wherever he may find them. It is not necessary to say whether or not that proposition be true to the extent contended for: but at all events it can have no

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application to the present case; for, there the party interferes for the benefit of the public. The rule is well laid down by Mr. Justice *Blackstone* (a): "Recaption or reprisal is another species of remedy by the mere act of the party injured. This happens when any one hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child, or servant: in which case the owner of the goods, and the husband, parent, or master may lawfully claim and retake them, wherever he happens to find them; so it be not in a riotous manner, or attended with a breach of the peace (b). The reason for this is obvious; since it may frequently happen that the owner may have this only opportunity of doing himself justice: his goods may be afterwards conveyed away or destroyed; and his wife, children, or servants, concealed or carried out of his reach, if he had no speedier remedy than the ordinary process of law. If therefore he can so contrive as to gain possession of his property again without force or terror, the law favours and will justify his proceeding. But, as the public peace is a superior consideration to any one's private property; and as, if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature; for these reasons it is provided that this natural right of recaption shall never be exerted where such exertion must occasion strife and bodily contention, or endanger the peace of society. If, for instance, my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use; but I cannot justify breaking open a private stable, or entering on the grounds of a third person to take him, except he be feloniously sto-

(a) 3 Bl. Com. 4.

(b) 3 Inst. 134; Hale, Anal. s. 46.

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len (a); but must have recourse to an action at law." In the present case it does not seem to me that the difficulty can occur which has been suggested on the part of the defendants, as to the defendant *John Haney* being without remedy unless he can justify entering upon the land of the plaintiff for the purpose of removing his property: for, if the barn, &c., are affixed to the freehold, he may bring ejectment, and if not, a refusal to give them up after demand, would amount to a conversion, for which he might bring trover: and he would thus gain a legal right to enter and take them away.

Mr. Justice PARK.—I am of the same opinion. The distinction drawn by *Blackstone* (cited by my Lord Chief Justice) is conclusive. It would appear from the pleas that the barn, &c., were attached to the freehold; if so, the only remedy was by ejectment. If they had been mere personal property trover would have lain. A neglect to restore goods demanded, after a reasonable interval, in effect amounts to a refusal, and is evidence of a conversion.

Mr. Justice BOSANQUET.—I am also of opinion that the pleas in this case cannot be supported. It is pleaded generally, that a person having property on the soil of another is justified in entering for the purpose of taking it away, without shewing under what circumstances it came there; and the case has been argued on the ground of the necessity of protecting one's property. But, if an entry upon the soil of the plaintiff had been necessary in this case, the defendants should have shewn it. If *A.*'s property be on the land of *B.*, it does not follow that *A.* shall be entitled, without any demand made, or without stating any ground for it, to enter upon *B.*'s land. In the cases where the law permits one to enter on the lands of another

to take his property being there, the particular circumstances are disclosed on the face of the justification. But, in the present case, the pleas suppose the right to enter in all cases, without any qualification, where property of the party is on the land of another.

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Mr. Justice ALDERSON.—I am of the same opinion. The difficulty suggested in the argument as to maintaining trover in this case, would apply with equal force to all other cases. A demand and *neglect* to deliver up the goods would be evidence of a conversion.

Judgment for the plaintiff (a).

(a) See *Comyns's Digest*, Title "Pleader," (3 M. 39) where it is laid down that "It is not a good justification that *J. S.* was possessed of a piece of timber which was placed in the *locus in quo* by a tempestuous wind, and that the defendant entered, as servant, to carry it away, because it does not appear but that the timber might have been purposely exposed to

the wind in such a manner as to make the wind blow it into the plaintiff's close, because it does not appear to have been fetched away in a proper time, because it does not appear the timber belonged to *J. S.* when it was blown over, and because it does not appear *the plaintiff was requested to permit the removal.*"

EVANS v. JAMES, a Prisoner.

Friday,
 Jan. 27th.

MR. Serjeant *Andrews*, on the 20th instant, had moved that the prisoner might be brought up under the compulsory clauses of the Lords' act (a), and required to deliver in a schedule of his estate and effects upon oath, and make

The Court refused to order a prisoner brought up under the compulsory clauses of the Lords' act to assign his pro-

erty, it appearing that a petition filed by him in the insolvent debtors' court remained for hearing in that court.

(a) 32 Geo. 2, c. 28, ss. 16, 17.

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the necessary assignment. He had been brought up in the last term, and remanded for sixty days, as required by the statute.

The prisoner prayed to be remanded, alleging that he had filed a petition in the insolvent debtors' court, upon which he had not yet been heard.

The Court ordered him to be remanded for a week.

The prisoner was accordingly on this day again brought up, when he produced an affidavit stating that his petition had been dismissed by the insolvent court for an informality; but that that court had yesterday granted him a rule for a re-hearing.

Mr. Serjeant *Andrews* submitted that the proceedings of the insolvent debtors' court ought not to be permitted to interfere with the jurisdiction of this Court; and prayed that the prisoner might be required to make the assignment directed by the statute.

PER CURIAM.—It appears that the prisoner's petition filed in the insolvent debtors' court has been dismissed for informality only, and that he has obtained a new rule in that court. It is true that the jurisdiction of this Court is not impaired or impeded by the proceedings in the other court; but this is an application to our discretion, and we must do that which seems to us the most consonant to justice. If the insolvent is honestly proceeding to do that which will obtain for his creditors a fair distribution of his property, we ought not to be called upon to interfere.

Remanded.

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MEDEIROS v. HILL.

THIS was an action of *assumpsit* on a charter-party of affreightment made at *Liverpool* on the 27th September, 1830, whereby the defendant, the owner of the vessel, engaged that the ship should, with all convenient speed after the delivery of her cargo at *Plymouth* (where she then was), return to *Liverpool*, and there load a full and complete cargo of salt, and proceed therewith to *Terciera*, and deliver the same there freight free, and take on board a full homeward cargo of fruit there or at *St. Michael's*: with the usual exception as to restraint of princes, &c. The breach assigned was, that the ship did not sail for *Liverpool* with all convenient speed after the delivery of her cargo at *Plymouth*, and there take on board a cargo of salt for *Terciera*.

By a charter-party the defendant engaged that his ship should return with all convenient speed to *L.*, and there load a full and complete cargo of salt, and proceed therewith to *T.*, and deliver the same there freight free, and there, or at *St. M.'s*, load a homeward cargo of fruit. At the time the charter-party was entered into, *T.* was in a state of blockade, which fact had been notified to Government, and officially communicated to *Lloyd's*:—*Held*, that the fact of the existence of the blockade was no excuse for the non-performance of the contract by the defendant, and did not render the voyage illegal in its inception.

The cause was tried before Lord Chief Justice *Tindal*, at the Sittings in *London* after last *Michaelmas* Term. The evidence was as follows:—Before the time of the execution of the charter-party, *viz.* in *March*, 1829, there had been an official notification at *Lloyd's*, that *Terciera* was in a state of blockade by the forces of the King of *Portugal*; since which time no notice had been given that the blockade had ceased. These facts were known to the parties when the charter-party was entered into; but the defendant's son said that was of no consequence, as the master might procure simulated papers. It appeared, however, that the blockade, which had never been very effective, had ceased to be a real blockade long before the charter-party was entered into. In her passage from *Plymouth* to *Liverpool*, the vessel touched at *Fowey*; there was no evidence as to the length of time she remained there: but, in consequence of this deviation, she was too late to ship the salt at *Liverpool*, and the voyage to *Terciera* was never performed. On the part of the defendant, it was contended that the proceeding to *Fowey*, which was not

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out of the proper and direct course from *Plymouth* to *Liverpool*, was no violation of the defendant's engagement to proceed with all convenient speed; and that, at all events, it having been officially notified that *Terciera* was in a state of blockade, he was excused from performing the contract, inasmuch as it was illegal in its inception.

His Lordship left it to the jury to say whether the defendant had been guilty of delay in proceeding to *Liverpool*, or prevented by the blockade from conveying the cargo to *Terciera*; and whether the blockade was effective or not.

The jury found for the plaintiff—damages, 100*l*.

Mr. Serjeant *Taddy*, on a former day in this term, moved for a rule *nisi* that this verdict might be set aside and a new trial had.—The defendant was guilty of no breach of his contract in going to *Fowey*; the mere touching there did not prevent his proceeding “with all convenient speed” to *Liverpool*. He was not bound to go direct. *Max v. Roberts (a)*.

The existence of the blockade at *Terciera* at the time the charter-party was entered into, was a legal excuse for the non-performance of the contract on the part of the defendant; for, he was not bound to incur the risk of seizure, to which he would have been liable had he attempted to break the blockade. In the case of *The Neptunus (b)*, Sir *William Scott* said, “that, in the case of a notified blockade, it is to be presumed that the notification will be formally revoked, and that due notice will be given of it; and that, till that is done, the port is to be considered as closed up, and, from the moment of quitting port to sail on such a destination, the offence of violating the blockade is complete, and the property engaged in it subject to confiscation.” In the present case, there was no notification that the blockade of *Terciera* had ceased. The rule above

(a) 12 East, 89.

(b) 2 Rob. Adm. Rep. 113.

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laid down was, in the case of *The Shepherdess* (a), relaxed in favour of *America*. The same learned Judge there said: "To all the general rules of the observance of a blockade duly imposed, the subjects of *America* are undoubtedly bound equally with those of other countries. At the same time, looking to the great distance at which they are placed, and being unwilling to press with any degree of hardship on the fair convenience of commerce, the Court has held, even where the blockade of a port in *Europe* has been notified in *America*, that the merchants of that country might still clear out conditionally for the blockaded port, on the supposition, that, before the arrival of the vessel, a relaxation might have taken place." But that cannot apply to a case like the present, where the voyage is to take place in the face of a blockade which was known to exist at the time. *Naylor v. Taylor* (b) proceeded upon the same principle as that laid down by Sir *William Scott*, in the case of the *Shepherdess*. That was an action on a policy on goods at and from *Liverpool* to any port or place in the river *Plate*, with liberty, in the event of a blockade, or being ordered off the river *Plate*, to proceed to any other port, and there wait or discharge. The ship sailed after the notification of the blockade; and it was contended, that, the voyage being to a blockaded port, after notification of the blockade, was illegal: but the Court held otherwise, *because there was no apparent intention to violate the blockade*, and there was a doubt whether the blockade would be continuing at the time of the ship's arrival out. Lord Chief Justice *Tenterden* there says (c): "We think there is no ground for saying that this voyage, as insured, was illegal in its commencement; indeed, according to the opinion of Lord *Stowell*, in the case of *The Shepherdess*, the vessel might have sailed for

(a) 5 Rob. Adm. Rep. 263.

(c) 9 Barn. & Cress. 723—

(b) 9 Barn. & Cress. 718; S. C. 4 Man. & Ryl. 531.

4 Man. & Ryl. 526.

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Buenos Ayres without contravening the law of nations, provided it was a part of the original intention to inquire as to the continuance of the blockade at some port of the blockading country; and in this case inquiry might have been made at *Monte Video*, or of any of the *Brasilian* ships met in the river *Plate*; and the policy is framed upon a doubt whether the blockade would continue at the time of the ship's arrival in the *Plate*, and does not indicate any intention to violate the blockade." The defendant in this case was clearly not bound to proceed on the voyage, until a notification from the proper quarter that the blockade was at an end, or had ceased to be effective. In *Touteng v. Hubbard* (a), where a *British* merchant chartered a *Swedish* vessel on a voyage to *St. Michael's* for a cargo of fruit, and the charter-party contained the usual exception against the restraint of princes, the ship having been prevented from reaching *St. Michael's* within the fruit season by an embargo laid on *Swedish* vessels by the *British* government, it was held that the *Swedish* owner could not, by proceeding on the voyage after the embargo was taken off, entitle himself to recover the freight against the *British* merchant. In the case of *The Spes and Irene*, Sir *William Scott* said (b): "The neutral merchant is not to speculate on the greater or less probability of the termination of a blockade, to send his vessels to the very mouth of the river, and say, if you do not meet with the blockading force, enter; if you do, ask a warning, and proceed elsewhere. The true rule is, that, after the knowledge of an existing blockade, you are not to go to the very station of blockade, under pretence of inquiry."

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court:—

(a) 3 Bos. & Pul. 291.

(b) 5 Rob. Adm. Rep. 80, 81.

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This was an action upon a charter-party, by which the defendant engaged that his ship should return with all convenient speed to *Liverpool*, and there load a full and complete cargo of salt, and proceed therewith to *Terceira*, and deliver the same there freight free, and there, or at *St. Michael's*, load a homeward cargo of fruit; and the breach alleged in the declaration was, that the ship did not return with all convenient speed to *Liverpool*, and there take the cargo on board, and sail on the voyage described in the charter-party.

After verdict for the plaintiff, and 100*l.* damages, a motion has been made for setting the same aside, and for a new trial, on two grounds—first, that, at the time the charter-party was entered into, *Terceira* was in a state of blockade by the government of *Portugal*, which blockade had been notified to the *English* government; and, consequently, that the voyage described in the charter-party was an illegal voyage—secondly, that, although the voyage may not be, strictly speaking, illegal, the circumstance of the blockade operated as an excuse for the non-performance of the contract.

The case of *The Neptunus* (a), which was cited in support of the first objection, establishes that it is illegal to attempt to enter a blockaded port, in violation of the blockade; and that, after notification of the blockade, the act of sailing to a blockaded port with the intention of violating the blockade, is in itself illegal. But, neither that case, nor any other that can be cited, has laid it down that the mere act of sailing to a port which is blockaded at the time the voyage is commenced, is any offence against the law of nations, where there is no premeditated intention of breaking the blockade, if it shall be found to continue in force when the ship arrives off the port. Any such determination would be destructive in many instan-

(a) 2 Rob. Adm. Rep. 110.

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ces of the fair commercial speculations of neutral merchants, to whom it might be of the first importance to possess the opportunity of introducing their goods into the port which has been blockaded, at the very earliest moment after such blockade had been relaxed. Such an object appears to be legal, both from the opinions of Sir *William Scott*, in the case of *The Shepherdess* (a), and from the judgment of Lord Chief Justice *Tenterden* in *Naylor v. Taylor* (b).

In the present case, there was no evidence of any understanding between the contracting parties that the defendant was to break the blockade of *Terceira* in order to deliver his outward cargo. Indeed, the fact of the blockade did not appear to enter into the contemplation of either party until after the defendant's son, the captain of the vessel, had signed the charter-party for his father; and, upon the evidence, the blockade had ceased to be a real and effective blockade long before the charter-party was entered into. We therefore see no reason for holding the contract to be void on the ground of illegality.

As to the second point, it is sufficient to say, that, as the blockade had been publicly notified to the government of *England*, the contracting parties must be taken to have entered into the charter-party with an equal knowledge of its existence; no difficulty, therefore, attending the performance of the contract can be set up as an excuse for its non-performance. In that case, the rule of law laid down in *Paradine v. Jane* (c) applies—"That, where a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."

We therefore think the rule for a new trial must be refused.

Rule refused.

(a) 5 Rob. Adm. Rep. 264. (b) 9 Barn. & Cress. 718. (c) *Alleyne*, 27.

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WOODCOCK v. NUTH.

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THIS was an action of *assumpsit*, for use and occupation. Plea, the general issue.

The cause was tried before Mr. Justice *Park*, at the Sittings at *Westminster* after the last *Michaelmas* Term. The sum sought to be recovered was 25*l.*, for a half-year's rent, to *Lady-day*, 1831. It appeared from the evidence, that the defendant had formerly held the premises in respect of which the rent was demanded, under a lease from the plaintiff, which lease expired at *Lady-day*, 1829; and that, on *Midsummer-day* following, he paid the plaintiff a sum of 2*l.* 10*s.*, being the balance of a quarter's rent after deducting 10*l.* due to the defendant on account of repairs; since which time the defendant had never been seen upon the premises, but they had been occupied by one *Lewis*, from whom the landlord had, at irregular periods, received four quarters' rent.

The plaintiff's collector, who was called as a witness, stated that he had received the rent from *Lewis* (or his wife) on account of the defendant; but there was not evidence to shew that either party had assented to this, nor were any of the receipts produced. Until this action was brought, no application had been made to the defendant, although *Lewis's* rent was always in arrear, and the defendant's place of residence (*Hammersmith*) was known to the plaintiff.

On the part of the plaintiff, it was contended, that, inasmuch the tenancy of the defendant had been established, the *onus* lay upon him to shew a dispensation from the contract by the plaintiff.

The learned Judge left it to the jury to say whether or not the plaintiff had accepted *Lewis* as his tenant.

The jury returned a verdict for the defendant.

The defendant held under a lease which expired at *Lady-day*, 1829. At *Midsummer-day* following, he paid a quarter's rent and quitted the premises, giving up possession to one *L.*, who continued to occupy, and paid rent to the plaintiff for two years. In an action for use and occupation, for arrears subsequently accruing, it was left to the jury to say whether or not the landlord had accepted the new tenant. They found that he had, and accordingly returned a verdict for the defendant. The Court refused to disturb it.

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Mr. Serjeant *Jones*, on a former day in this term, obtained a rule *nisi* that this verdict might be set aside, and a new trial had, on the ground of misdirection.—He submitted that there was no evidence whatever to shew the determination of the relation of landlord and tenant as between the plaintiff and defendant; and he referred to the cases of *Ward v. Mason* (a), *Harland v. Bromley* (b), *Harding v. Crethorn* (c), and *Bull v. Sibbs* (d).

Mr. Serjeant *Wilde* now shewed cause.—The evidence given on the part of the plaintiff was not sufficient to establish the fact of a continuing tenancy by the defendant. In *Freeman v. Jewry* (e), *A.*, being in possession of premises under a lease for years, underlet them from year to year to the defendants, who knew the extent of his interest; the plaintiff afterwards took a lease of the same premises, expectant on the determination of *A.*'s term, and the defendants, after the determination of *A.*'s term, continued in possession for a quarter of a year, when they paid the rent for that period, and claimed to give up the premises; it was held, in an action for use and occupation for a subsequent period, that there was no evidence of a tenancy continuing beyond that quarter of a year. In

(a) 9 Price, 291.—If a tenancy be established by the plaintiff in an action for use and occupation, it is incumbent on the defendant to shew that the tenancy was afterwards determined, or that the landlord had accepted another person as tenant.

(b) 1 Stark. N. P. C. 455.—Where a defendant has been shewn to be in possession, the continuance of the tenancy is to be presumed, until the contrary appears.

(c) 1 Esp. Rep. 57.—When a lease expires, the tenant continues liable to the rent, unless he deliver up complete possession of the premises, or the landlord accepts another in his room.

(d) 8 Term Rep. 327.—If *A.* let lands to *B.* who permits *C.* to occupy them, *A.* may recover the rent in an action against *B.* for use and occupation.

(e) 1 Moody & Malkin, 19.

Ward v. Mason, the only question was whether the Judge should not have sent the case to the jury, instead of nonsuited the plaintiff. Here, the question was properly submitted to the jury, and the evidence warranted their finding. The fact of a yearly tenancy is not to be implied from a single payment of a quarter's rent, unsupported by other circumstances.

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[Mr. Justice *Alderson* referred to *Bishop v. Howard* (a). There, a lease of premises for a term of years expired at *Midsummer*, 1821, and the tenant refused to give up possession at that time, and insisted that he was entitled to a notice to quit, and continued in possession until *Christmas* following, and paid rent to that time, when he tendered the keys of the premises to his landlord, which the latter refused to accept: it was held that such continuing in possession by the tenant did not amount to a holding over by him, but was conclusive evidence of a tenancy from year to year, which entitled the landlord to maintain an ejectment for the use and occupation of the premises, to recover the amount of a quarter's rent, which became due at *Lady-day*, 1822.]

That case is distinguishable from the present: there, there was an absolute retention of the premises by the tenant. Here, the jury have, by their verdict, found that *Lewis*, the new tenant, occupied the premises under the sanction of the plaintiff.

Mr. Serjeant *Jones*, in support of his rule.—The evidence *prima facie* established the tenancy of the defendant, and he shewed nothing to discharge himself from his responsibility. A payment of rent admits a tenancy, and the law implies a tenancy from year to year. There was no evidence of any fresh contract between the plaintiff and *Lewis*; on the contrary, it was proved that the

(a) 3 Dow. & Ryl. 293; S. C. 2 Barn. & Cress. 100.

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rent accruing since the defendant quitted the premises had been received on his account from *Lewis*.

Lord Chief Justice TINDAL.—I see no sufficient reason for sending this cause down for a new trial. It is not necessary to determine whether or not the defendant, on the expiration of his lease, became tenant from year to year of the premises in question. We may, however, assume that he did, which is the most favourable view of the case for the plaintiff. The case went to the jury with that assumption; and it was left to them to say whether or not *Lewis*, the new tenant, had been accepted by the landlord. It is contended on the part of the plaintiff that there was no evidence of this fact: but there was some evidence, and enough I think to warrant the conclusion to which the jury have come. It appeared that the plaintiff had held the premises under a lease which expired at *Lady-day*, 1829, and that, on the *Midsummer-day* following, he paid a quarter's rent for the premises, the plaintiff allowing a deduction of 10*l.* on account of certain repairs. That was the only time, since the expiration of his lease, that the defendant was seen upon the premises. The rent has ever since been paid by *Lewis*, the new tenant, or his wife, but never on the precise quarter day. It would seem, therefore, that this was a settlement between the plaintiff and defendant upon the latter quitting the premises. The jury might fairly conclude it not to be improbable that the landlord should suffer his rent to be in arrear during the continuance of the tenancy; but that, on a settlement with an outgoing tenant, the rent should be demanded on the precise day it became due. It is true that the plaintiff's collector stated that he subsequently received the rent on account of the defendant: but, he did not say that the defendant's name was ever mentioned when he applied for or obtained the rent from *Lewis*; he merely stated it as something passing in his own mind; he did not say that

he looked to the defendant as tenant; and no application was ever made to the defendant until the present action was brought, although the plaintiff knew where he was residing. The amount in dispute is small; and, upon a question of mere fact, it would be idle to send the cause down again.

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Mr. Justice BOSANQUET.—I am of the same opinion. The question is, whether or not there was reasonable evidence to support the verdict—whether the defendant was tenant to the plaintiff during the period for which the rent is sought to be recovered in this action. The payment by the defendant of a quarter's rent after the expiration of his tenancy was only *prima facie* evidence of a continuing tenancy, and might be rebutted. The only evidence was, that, on the *Midsummer-day* succeeding the expiration of the defendant's lease, he settled with the landlord for a quarter's rent up to that day, and then quit-
 ted the premises, and was never seen there again; and that a new occupier was let in and paid rent to the plaintiff's agent for four quarters: the defendant residing all the while at another place, in the knowledge of the plaintiff, who never made any application to him on the subject. All these circumstances were clearly such as to warrant the conclusion of the jury. That the subsequent rent was received from *Lewis*, the new tenant, on account of the defendant, seems to have been a mere inference of the plaintiff's collector, having no foundation.

Mr. Justice ALDERSON.—If the question now before the Court depended on the point ruled in the case of *Freeman v. Jewry*, I should require time to consider it: but it does not become necessary to offer any opinion upon that point here. Supposing a tenancy from year to year to have been created, still the question, whether the plaintiff had

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or had not subsequently accepted a new tenant, was properly left to the jury, and I think the evidence warranted the verdict they have found. The plaintiff's case depended altogether upon the evidence of the collector, who stated that he had, after the expiration of the defendant's lease, received from him a quarter's rent of the premises, making some allowances for repairs; and that he had since that period received four quarters' rent from *Lewis*, the new tenant; but he appends this qualification, *viz.* that he received these payments on account of the defendant. The jury were at liberty to disbelieve this latter statement.

Mr. Justice PARK.—It is admitted that the question submitted to the jury was the only proper one for their consideration. I was at first inclined to nonsuit the plaintiff, but, at the request of his counsel, I sent the case to the jury. The last payment by the defendant was made on the precise day the rent was due: all the payments that have since been made by *Lewis* were made three or four months after the rent accrued. It did not appear that the payments of rent by *Lewis* were stated by him to be made on account of the defendant; neither was any receipt produced: but the collector merely said that he *received* the rent as on the defendant's account.

Rule discharged.

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ELTON v. LARKINS.

THIS was an action of *assumpsit* on a policy of insurance effected on the 29th December, 1828, at thirty shillings *per cent.*, upon the ship *Fanny*, at and from *Cadix* to *London*, with liberty to touch and deliver goods at *Exmouth*.

The cause was tried before Mr. Justice *Bosanquet*, at the Sittings in *London* after the last term. The evidence was as follows:—

On the 25th November, 1828, the captain of the *Fanny* wrote to the plaintiff, from *Cadix*, informing him that the last boat was then alongside, and the ship nearly loaded, and that she would probably sail for *London* the next day, and that another ship, the *Traveller*, had sailed that day. This letter came to the plaintiff's hands on the 17th December: on the 27th, the insurance was effected, but the letter was not communicated to the underwriter. On the 20th December, it appeared by *Lloyd's List*, that the *Traveller* had been towed into *Kinsale* in distress; and that the *William*, which had sailed from *Cadix* on the 30th November, had arrived safe at *Gravesend*. On the 15th December, a printed list from *Cadix* was received and filed in the inner room at *Lloyd's*, containing (amongst others) the following announcement—21 Nov. *Traveller*, ———, *para Londres*;" and, on the 22nd, another, as follows—"25 Nov. *Bergantin Fanny*, *John Taylor*, *para Londres*." It appeared to be rather unusual for underwriters to refer to the foreign lists at *Lloyd's*. The average length of a voyage from *Cadix* to *London* was proved to be from twenty to twenty-five days; though sometimes as much as sixty days.

Under these circumstances, had the time of sailing of the ship *Fanny* been known to the underwriter when the insurance was effected, she would have been deemed a missing ship, and scarcely insurable at any premium.

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Semble that the information as to the time of sailing of ships from foreign ports, contained in the foreign lists filed in the inner room at *Lloyd's*, does not dispense with the necessity of the assured disclosing to the underwriter at the time of insuring a letter received by him from his correspondent or the captain, announcing his intention to sail the next day, where the knowledge of that fact becomes material.

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On the part of the defendant, it was contended that the letter of the 21st *November*, received by the plaintiff from his captain, was material and should have been communicated to the defendant at the time of insuring, inasmuch as the knowledge of the facts it contained would greatly have enhanced the premium. On the other hand, it was submitted that the announcement in the *Spanish* list at *Lloyd's* dispensed with the necessity of communicating this letter.

The learned Judge left it to the jury to say whether or not the letter was material and ought to have been communicated to the defendant; or whether the *Spanish* list filed at *Lloyd's* rendered such communication unnecessary.

The jury returned a verdict for the plaintiff.

Mr. Serjeant *Spankie*, in the last *Michaelmas* Term, obtained a rule *nisi* that this verdict might be set aside, and a new trial had, on the ground urged at the trial.—He referred to the case of *Kirby v. Smith* (a), where a ship had sailed from *Elsineur* on her voyage home six hours before the owner, who followed in another vessel on the same day, and, having met with rough weather on his passage, arrived first, and then caused an insurance to be effected on his own ship: it was held that these circumstances were material to be communicated to the underwriter, and that it was not sufficient to state merely that the ship insured was “all well at *Elsineur* on the 26th of *July*,” the day of her sailing.

Mr. Serjeant *Wilde* shewed cause.—The assured is, undoubtedly, bound to communicate to the underwriter any fact that may have come to his knowledge calculated to operate upon his estimation of the risk. The time of sailing of a vessel from a foreign port, however, is not of itself

(a) 1 Barn. & Ald. 672.

a material fact, or one which the assured is bound to make known at the time of insuring; it is only in consequence of something that may afterwards happen that this fact can become material. The facts proved here relative to the ships *Traveller* and *William* alone made the time of sailing of the *Fanny* material: but there was no evidence to shew that the defendant had at the time of insuring any knowledge of the sailing of the *William*; and the *Fanny* could not have been deemed a missing ship on the 27th December, for it appeared by the evidence that the voyage was sometimes so long as sixty days. Every necessary information was within the defendant's reach at *Lloyd's*: had he used reasonable diligence, he would have been in full possession of the facts contained in the letter. In *Friere v. Woodhouse* (a), it was held, that, in effecting a policy of insurance, a circumstance of intelligence inserted in *Lloyd's* lists need not be communicated to the underwriters, however important it may be to the computation of the risk; for it is to be presumed within their knowledge, and to be taken into account.

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Mr. Serjeant *Spankie*, in support of his rule.—In *Friere v. Woodhouse*, the list in question was the *English* list posted at *Lloyd's*, whereas here, the list was in the *Spanish* language, which every man is not to be supposed to understand: that materially distinguishes the two cases. In *M^r Andrew v. Bell* (b) it was held, that, if it appear that a party did not intend to insure until he believed the ship to be missing, and then not until another ship which had sailed at the same time had arrived in safety, the concealment of this fact is fatal. In *Bridges v. Hunter* (c), where the plaintiffs effected a policy of assurance on wines from *Oporto to London*, on the 12th November, at which time

(a) Holt, 572. (b) 1 Esp. Rep. 373. (c) 1 Mau. & Selw. 15.

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they were in possession of two letters from their correspondents at *Oporto*; the first of which, dated the 11th *October*, stated thus: "we are loading the wines on board the *Stag*, Captain *Wheatley*, who intends to sail after tomorrow;" the other, dated the 18th *October*, inclosed the bills of lading, which were filled up, "with convoy;" which letters the plaintiffs did not communicate to the underwriters: it was held that this was a material concealment. In *Ratcliffe v. Shoolbred* (a) where the insured knew that his ship had sailed from the coast of *Africa* on a certain day, and only stated that she was on the coast on that day, it was held to be a material concealment, and to vitiate the policy. And in *Willes v. Glover* (b), in an action on a policy on goods from *Berderygge* to *London*, effected by the consignees on the 13th *December*, without communicating a letter received by them the day before, but dated the 30th *November*, informing them that the captain would sail the next day, and directing them, if he should not be arrived, to effect the insurance as low as possible: it was held to be a material concealment, though the ship did not in fact set sail until the 24th *December*. The general rule is, that the assured must, at the time of insuring, fairly communicate to the underwriter every thing within his knowledge, that, if known to the underwriter, would influence his mind in estimating the risk, in order that the parties may be placed upon an equal footing. In the present case, if the letter received by the plaintiff had been communicated to the defendant at the time the policy was effected, his attention would have been roused, and he would have consulted the foreign list, which, on ordinary occasions, underwriters are not in the habit of looking at.

Cur. adv. vult.

(a) *Park. Ins.* 290; 1 *Marsh. Ins.* 466.

(b) 1 *New Rep.* 14.

Lord Chief Justice TINDAL now delivered the judgment of the Court:—

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Upon consideration of this case, we feel great doubt as to the ground upon which the jury have given their verdict for the plaintiff. They may have grounded their verdict upon the opinion which they formed that the communication which the defendant contends ought to have been made to him by the plaintiff was not a material communication; and if we could ascertain that this point had been distinctly found by the jury, we should not have disturbed the present verdict. But the jury may have come to their conclusion upon a different ground; namely, that, admitting that the communication was material in itself, yet the knowledge of the facts which the defendant had in his power from the inspection of the book in the inner room at *Lloyd's* dispensed with the necessity of such communication being made, and that the want of such communication could not now be set up as an answer to the action.

Being, therefore, uncertain as to the real ground on which the verdict proceeded, and, as the evidence now stands, being dissatisfied with the verdict if grounded on the second point, we think the cause should go before another jury, the defendant paying the costs of the former trial.

Rule absolute, on payment of costs.

GARRARD v. WOOLNER and Another.

Saturday,
Jan. 28th.

THIS was an action of *assumpsit* brought to recover the amount of two bills of exchange for 500*l.* each, drawn by

The plaintiff attended a meeting of the defendants' creditors, and concurred

in certain resolutions for the execution of a release to the defendants on their executing an assignment of all their effects to trustees, for distribution amongst their creditors. The defendants and the trustees at first disputed the amount of the plaintiff's debt, but subsequently altogether refused to allow him to come in under the deed:—*Held*, that his having signed the preliminary resolutions was, under the circumstances, no bar to his right to sue the defendants for his original debt.

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one *George Loft* upon and accepted by the defendants, and indorsed by *Loft* to the plaintiff. The bills were dated the 24th *October*, and 27th *November*, 1828.

The cause was tried before Lord Chief Justice *Tindal*, at the Sittings in *London* after the last term. The defence was twofold—first, that there was usury between the plaintiff and *Loft*—secondly, that the plaintiff was not in a situation to maintain the action, he having become a party to an agreement entered into by the defendants with their creditors, for payment of a composition upon the amount of their respective debts. The first ground of defence was negatived by the jury: and, as to the second, the facts were as follow:—

On the 5th *March*, 1829, the defendants wrote to the plaintiff, apprizing him of their having stopped payment, and requesting him to attend a meeting of their creditors on the 9th, at the office of their attorney. The plaintiff accordingly attended the meeting, when certain resolutions were entered into by the creditors present, to the effect that the defendants' property should be assigned to trustees for the benefit of their creditors; that the defendants' effects should be disposed of in the same way as if a commission of bankrupt had issued; that the deed should contain a clause of release; that it should be void unless signed by all the creditors within two months; and that the defendants should assist in winding up the concern, receiving a reasonable allowance for their trouble. These resolutions were signed by several of the creditors, and, amongst the rest, by the plaintiff, as a creditor for 1,000*l.*, two others signing after him. On the 19th *May*, the defendants wrote to the plaintiff, stating that they were requested by the trustees to say, that, on his signing the composition-deed, a dividend of five shillings in the pound would be paid to him. The defendants and their trustees, however, afterwards refused to allow the plaintiff to rank as a creditor for the sum claimed by him, alleging that he had,

before the resolutions of the 9th *March* were entered into, obtained a sum of £18*l.* 10*s.*, in part payment, from *Loft*. The plaintiff refused to accept a dividend upon the smaller sum proposed, alleging that the payment by *Loft* was subsequent to the 9th *March*; and, on the 11th *August*, he wrote to the defendants, threatening to sue them unless his demand was complied with. The letter was on the next day answered by their attorney, as follows:—

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"Sir,—In answer to your letter of yesterday, asking whether you are to be paid dividends on the 1,000*l.*, and stating, that, if not, you will take out a writ against the Messrs. *Woolners* without delay, I am compelled to say that you never can be admitted a creditor for a sum not due to you; you must deduct from the 1,000*l.* the £18*l.* 10*s.* received by you in part payment prior to their failure."

The amount of the plaintiff's debt continued under discussion from *March*, 1829, to *February*, 1830. In the mean time *Loft* became bankrupt; and the defendants' trustees, surmising, from what transpired on his examination before the commissioners, that the contract between the plaintiff and *Loft* as to these bills was usurious, altogether refused to allow the plaintiff to come in under the deed; and accordingly the following letter was addressed by their attorney to the plaintiff's attorneys:—

"Gentlemen,—Messrs. *Woolners*' trustees are of opinion, that, after the evidence given by Mr. *Loft* before the commissioners at their last meeting, they would not be justified in allowing Mr. *Garrard* to rank as a creditor. If you should be desired by Mr. *Garrard* to proceed against Messrs. *Woolners*, I will thank you to send the writ to me."

Neither the resolutions of the 9th *March*, nor the deed

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of assignment, was executed by the defendants: nor did it appear that all the creditors had signed the release. Three dividends had been paid under the deed, amounting together to eleven shillings in the pound.

The jury returned a verdict for the plaintiff—damages, 892*l.* 15*s.*, and leave was reserved to the defendants to move to set it aside, and enter a nonsuit, upon the last ground of objection.

Mr. Serjeant *Taddy*, accordingly, on a former day in this term, obtained a rule *nisi*.—He cited *Cork v. Sanders* (a), and *Tatlock v. Smith* (b), as authorities to shew that the right of the plaintiff to sue the defendants was suspended by his having assented to the resolutions preliminary to the deed of composition: and he contended that the plaintiff's proper remedy was by bill in equity against the trustees, to compel them to allow him to come in under the deed.

Mr. Serjeant *Wilde* (with whom was Mr. Serjeant *Andrews*) now shewed cause.—The defendants were no parties either to the original agreement entered into in the resolutions of the 9th March, 1829, or to the deed: up to the time of the trial, they had done no act to divest themselves of any of their property. Although the plaintiff signed the resolutions as a creditor, yet the defendants and their trustees subsequently resisted his claim, and refused to permit him to execute the deed. In the case of *Tatlock v. Smith*, the whole of the defendants' property had passed by delivery over to the trustees, and every thing beneficial had been done for the creditors. *Cranley v. Hil-larey* (c), *Boothbey v. Sowden* (d), *Ex parte Vere* (e), and

(a) 1 Barn. & Ald. 46.

(b) 3 Moore & Payne, 676; S.
 C. 6 Bing. 339.

(c) 2 Mau. & Selw. 120.

(d) 3 Camp. 175.

(e) 1 Rose, 281.

McKenzie v. McKenzie (a), are express authorities to shew that a departure by the debtor from the original agreement, or a failure in the performance of any of the stipulations therein contained on his part, discharges the creditor, and remits him to his original rights.

[Lord Chief Justice *Tindal*.—The difficulties against which the defendants will have to contend are these—first, that there is no deed of assignment, no execution by the defendants—secondly, that, by the acts of the defendants and the trustees, the plaintiff has been prevented from availing himself of his concurrence in the resolutions which formed the preliminary agreement.]

The Court called on—

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Mr. Serjeant *Taddy*, to support his rule.—It may be admitted, that, as the deed of assignment was not executed by the defendants, the plaintiff's debt was not extinguished; but, his assenting to the resolutions of the 9th *March*, operates as a *suspension* of his right to sue for his original demand, until the trusts of the deed thereby contemplated have been carried into effect, and the demands of all the defendants' creditors satisfied *pro tanto*. The trustees were willing to allow the plaintiff to rank as a creditor for a part of his claim up to the 27th *February*, 1830; but he insisted upon his right to come in as a creditor for the full sum of 1,000*l*. The case of *Tatlock v. Smith* (b) was decided on the principle of the suspension of the plaintiffs' right to sue, and not of the extinction of the debt. There, the defendants entered into an agreement with their creditors that trustees should be appointed for the purpose of settling their affairs, by the collection, sale, and division of their estate and effects equally among their creditors, who agreed that the trustees should take a conveyance and as-

(a) 16 Ves. 372.

(b) 3 Moore & Payne, 676; S. C. 6 Bing. 339.

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signment of the defendants' estate and effects, and manage their affairs until each creditor should have received full payment of his debt, the surplus to be paid over to the defendants; and the defendants agreed to make a conveyance and assignment of all their estate to the trustees whenever thereunto required—the deed to contain all usual and necessary clauses. The trustees accordingly took possession of the defendants' effects, and paid each creditor ten shillings in the pound. A deed of conveyance was prepared, which the defendants were required to execute; but they refused to do so, the deed not containing a clause of release. At the time the deed was tendered for execution, one of the defendants only was present, and the meeting at which it was produced was adjourned for the purpose of procuring the assent of the other defendant. The plaintiffs (creditors) signed the deed, and received ten shillings in the pound upon the amount of their debt, and afterwards sued the defendants for the residue. The Court held the action to be premature, inasmuch as the parties, by entering into the agreement, contemplated a suspension of the rights of the creditors to sue. Lord Chief Justice *Tindal* there said (a): "The ground on which I directed the plaintiffs to be nonsuited was, that they were not in a situation to bring this action after the agreement they had entered into, unless they could shew that it was no longer in force, or that it had been broken by the defendants. But there was a total absence of proof of either of these facts. The parties, by entering into the agreement, contemplated a suspension of the plaintiffs' right to sue as creditors, whilst the agreement was in operation."

[Mr. Justice *Alderson*.—In that case there was no breach of the agreement on the part of the debtors.]

Neither was there here. The defendants were guilty of no breach of the agreement in not having executed the

(a) 3 Moore & Payne, 686.

deed; for, there was no time limited for their execution of it: nor were they ever called upon to execute it.

[Lord Chief Justice *Tindal*.—According to the resolutions, the assignment was to be executed by the defendants before they were released by the creditors, and there was a clause rendering the deed void unless signed by all the creditors within two months.]

In *Boothbey v. Sowden* (a), a man being embarrassed, all his creditors signed an agreement to give him time to pay by instalments, and to take his promissory notes for the amount; and it was held that this agreement was binding on each of them, the signing of the others being a sufficient consideration, and that they could not sue for their original cause of action without proving that the agreement had been broken on the part of the debtor. In *Cork v. Saunders* (b), A., being insolvent, by agreement, stipulated to assign his property immediately, the creditors consenting that the business should be carried on for their benefit until the next *Michaelmas*, and that then the property should be divided among them: the insolvent assigned his effects: at the next *Michaelmas*, several of the creditors who had signed this instrument agreed that the business should be carried on by the trustees for a further time: it was held that a creditor who had signed the first agreement, but who had not in any way concurred in the second, could not maintain an action against the insolvent for a debt existing at the time of the first agreement. "The plaintiff," said Lord *Ellenborough*, "by the terms of the agreement, consents that the property of the defendant shall be assigned, and be in the management exclusively of the defendant, under the direction of the trustees, until *Michaelmas*. How can the plaintiff, then, replace the other creditors in the same situation? I should have been inclined to remit him to his original rights, if

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(a) 3 Camp. 175.

(b) 1 Barn. & Ald. 46.

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all the other parties could have been placed in their original situation; but that is impossible. This is an anomalous case; in which the plaintiff cannot stand in his former situation, nor can I say at present that the whole shall be nullified." And Mr. Justice *Bayley* said: "By the terms of the agreement, it is stipulated that the farming concern shall be carried on until *Michaelmas* for the benefit of the creditors who might concur; and it contains a further stipulation, that the debtor shall assign all his estate *immediately*; the consequence of which would be, that he would thereby divest himself of all means of payment. It is true, that the defendant remains in possession, but as servant only to the trustees; he has not a single article of property which he can appropriate to the payment of his debts. The plaintiff confides in the trustees, that they will perform the duties reposed in them; this they neglect to do; and they postpone the period at which they ought to sell. The non-division, however, of the property cannot, under the circumstances, remit the creditor to his original rights. The parties not having provided for that event by the terms of the agreement, it appears to me that their only remedy is in equity. Suppose the trustees had refused to sell, and the defendant had urged them on, could the plaintiff have sued in that case? The conduct of the defendant in respect of the postponement amounts only to this, that he does not find fault with the trustees. But I do not think that that puts the plaintiff in a better situation than if the postponement had been the mere act of the trustees." In the present case, even supposing that the defendants had been guilty of an infraction of the original agreement, the plaintiff had no right to bring this action, and thereby seek to prejudice the rights of third parties: his only remedy is in equity; his right to sue at law is clearly suspended, for, the agreement is not altogether at an end. In *Cork v. Saunders* no division of the insolvent's property had been made; whereas, here, the cre-

ditors have received three dividends upon the amount of their respective debts.

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Lord Chief Justice TINDAL.—I am of opinion that the resolution of the 9th *March*, 1829, and the circumstances that have since occurred, do not operate as a bar or suspension of the plaintiff's right of action. On the part of the defendants, it is contended, that, as the plaintiff concurred in and signed the resolutions entered into for the distribution of the defendants' property amongst their creditors, his right of action was suspended until the whole estate of the defendants had been applied in satisfaction of their debts. But, under the particular circumstances of this case, I think that argument is untenable. It appears that the plaintiff was, by the act of the defendants themselves, prevented from availing himself of the benefit of those resolutions. On the 9th *March*, 1829, the plaintiff was admitted to be a creditor for 1,000*l.*, and he signed the resolutions that had then been entered into by the creditors of the defendants. Some time afterwards the amount of his debt was disputed, on the ground of his having received part payment of the bills which constituted his debt, from the drawer; and the defendants' trustees refused to allow the plaintiff to rank as a creditor for the amount for which he had signed the resolutions, and thus deprived him of all benefit under them. The resolutions, therefore, as far as the plaintiff is concerned, were never carried into effect at all; nor was the deed of assignment, which the defendants undertook to execute, ever made by them. The other creditors, who have received all the benefit of the deed, are estopped from complaining of the non-execution by the defendants: they have had the dividends under it. But the deed affords no answer to the plaintiff's demand. He was, by the act of the defendants and their trustees, prevented from executing the deed, and therefore reverts to his original right ad-

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mitted in the resolutions, which the defendants have failed to carry into effect. It therefore appears, that, by the consent of all parties, the plaintiff was considered to be out of the pale of the resolutions altogether. A doubt was entertained as to the amount of his debt; and the trustees also seem to have doubted whether he was a creditor at all. The letter of the attorney for the trustees states that—"Messrs *Woolners'* trustees are of opinion, that, after the evidence given by Mr. *Loft* before the commissioners at their last meeting, they would not be justified in allowing Mr. *Garrard* (the plaintiff) to rank as a creditor." That clearly amounts to a consent on the part of the defendants and their trustees, that the plaintiff should be discharged from the resolutions he had concurred in, and be remitted to his rights as if he had never signed them. This distinguishes the present case from all the authorities that have been cited on the part of the defendants, to shew, that, where a creditor agrees to take a composition from his debtor, and thereby induces others to concur, he is not at liberty afterwards to resort to his original demand, for, that would be a fraud upon the other creditors. But here there has been an infraction of the original agreement by the defendants, who refuse to permit the plaintiff to come in under the deed in the character of a creditor. The case therefore falls within the rule laid down by Lord *Ellenborough*, in *Boothbey v. Sowden*—"If," says his Lordship, "the plaintiffs could shew that the defendants had refused to give them the notes according to the terms of the agreement, they might be remitted to their original remedy; but I think that remedy is suspended by the agreement, *unless an infraction of the agreement on the part of the defendants is proved by the plaintiffs.*" I therefore think this rule must be discharged.

Mr. Justice PARK.—I am clearly of the same opinion. The short question is, whether the defendants have fulfil-

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led the terms of their agreement with the plaintiff. The plaintiff signed the resolutions as a creditor of the defendants, and the trustees now refuse to permit him to come in as a creditor under the deed. There is therefore nothing to suspend the plaintiff's right to sue. The letter addressed by the defendants' attorney to the plaintiff's attorneys remitted the plaintiff to his original right. The attorney there says—"Messrs *Woolners*' trustees are of opinion, that, after the evidence given by Mr. *Loft* before the commissioners at their last meeting, they would not be justified in allowing Mr. *Garrard* to rank as a creditor. If you should be desired by Mr. *Garrard* to proceed against Messrs. *Woolner*, I will thank you to send the writ to me." That clearly discharged the plaintiff from all restraint imposed upon him by his concurrence in the resolutions of the 9th March. The cases of *Cranley v. Hillarey* and *Boothbey v. Sowden* go the full length of this. In the latter case, Lord *Ellenborough* says: "If the plaintiffs could shew that the defendants had refused to give them the notes according to the terms of the agreement, they might be remitted to their original remedy. But I think that remedy is suspended by the agreement, unless an infraction of the agreement on the part of the defendants is proved by the plaintiffs." In *Cranley v. Hillarey*, it was contended on the part of the defendant, that no infraction of the agreement by him was proved; but that, on the contrary, it appeared that the notes were ready for the plaintiff, who might have received them upon applying for them, but he never did make the application; and that it was the duty of the plaintiff to shew a demand and refusal of the notes. But Lord *Ellenborough* said: "The rule is, that the person to be discharged is bound to do the act which is to discharge him, and not the other party. If the defendant had offered the notes at the time of action brought, it might have been a ground for staying the proceedings." And Mr. Justice *Dampier* said: "It is laid down by *Lit-*

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tleton (a), that the obligor of a bond conditioned for the payment of money at a particular day, is bound to seek the obligee, if he be in *England*, and at the set day to tender him the money, otherwise he shall forfeit the bond. So, in this case, the defendant was to give the notes, and therefore to go with them to the plaintiff, and he was not to go to the defendant." The case of *Cork v. Sanders* does not affect this. There, the defendant had signed the deed, and all his effects were thereby assigned, and the plaintiff had had all the benefit contemplated thereby: the Court merely held that the postponement of the sale stipulated for by the composition-deed, without the plaintiff's concurrence, did not remit him to his original right of action.

Mr. Justice BOSANQUET.—It is admitted that the plaintiff's debt upon the bills is not extinguished: but it is said that his right to sue is suspended by the agreement he had entered into with the defendants in the resolutions of the 9th *March*. The defendants have, however, subsequently repudiated that agreement, and consequently the plaintiff is released from it, and remitted to his pre-existing right.

Mr. Justice ALDERSON.—If the resolutions had been entirely complied with, and there had been no default on the part of the defendants, the plaintiff's right of action would have been thereby suspended: but the defendants cannot now be permitted to set up the resolutions as a bar to the plaintiff's claim, he having, by their own act, been prevented from availing himself of the agreement.

Rule discharged.

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BAYNON v. BATLEY.

Saturday,
Jun. 28th.

THIS was an action of covenant. The declaration stated, that, on the 30th of *January*, 1828, at *London*, &c., by a certain indenture then and there *purporting to be made* between the defendant of the first part, *Awdry Ann Batley*, the wife of the said defendant, of the second part, and one *William Batley* and one *Henry Batley* of the fourth part; one part of which indenture, sealed with the seal of the said defendant, the plaintiff brought there into Court, the date whereof was a certain day and year therein mentioned, to wit, the same day and year aforesaid—after reciting a disagreement between the defendant and his wife, and an agreement by him to make her a separate allowance by an annual payment of 240*l.* to the plaintiff as her trustee, the plaintiff undertaking to indemnify the defendant against half his wife's debts—*it was witnessed*, that, in pursuance of the recited agreement, and in order in part to effectuate the same, and make such provision for the said *Awdry Ann Batley* as thereafter expressed, and in consideration of the sum of ten shillings of lawful money of *Great Britain* by the plaintiff to the defendant in hand paid at or before the execution of the said indenture, the receipt whereof was by the said indenture acknowledged, the said defendant did, for himself, his heirs, executors, and administrators, amongst other things, covenant, promise, and agree, to and with the said plaintiff, his executors, administrators, and assigns, in the manner following, that is to say, that he, the said defendant, should and would well and truly pay or cause to be paid to the said plaintiff, his executors, administrators, and assigns, the said annuity or clear yearly sum of 240*l.* for and during the term of the natural life of the said defendant, in case the said *Awdry Ann Batley* should so long live. The declaration then averred the separation of the defendant and

In covenant by a trustee upon a deed whereby the defendant covenanted to pay a certain sum yearly by way of separate maintenance for his wife, the declaration alleged, that, "by a certain indenture then and there *purporting to be made* between the plaintiff, the defendant, and others, *it was witnessed* that the defendant did covenant, &c." The defendant pleaded, that, *after the making of the indenture*, the wife had committed adultery with one *A. T.*:—*Held*—*first*, that the plea was no bar to the action—*secondly*, that the allegation in the declaration was sufficient after plea.

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his wife, and that the latter was still living—Breach, non-payment of the annuity of 240*l*.

The defendant pleaded—*first*, the general issue, *non est factum*—*secondly*, that, *after the execution of the said indenture*, and before the arrears of the annuity claimed became due and payable, the said *Audry Ann Batley*, the wife of the said defendant, had committed adultery with one *Alfred Talbois*.

To this plea the plaintiff demurred: the defendant joined in demurrer.

Mr. Serjeant *Spankie*, in support of the demurrer, was stopped by the Court, who—referring to the case of *Jee v. Thurlow* (a)—called upon Mr. Serjeant *Taddy*, for the defendant, to distinguish it from the present case. There, by indenture between husband and wife of the first and second parts, and a trustee for the wife of the third part, reciting that unhappy differences had arisen between the husband and wife, and that they had mutually agreed to live separate, the husband covenanted to pay an annuity of 80*l*. during so much of the wife's life as she should live, in full satisfaction of her support and maintenance, and of all alimony whatsoever, and that he would not at any time thereafter sue her for the restitution of conjugal rights; and the trustee covenanted that the wife should release her husband's real and personal estate from all claims for jointure, dower, or thirds, and that he would indemnify the husband for debts incurred by the wife after separation: it was held that such indenture was valid in law, and that a plea by the husband, "that the wife had instituted a suit in the Ecclesiastical Court, for restitution of conjugal rights, in which cause he had put in an allegation and certain exhibits, charging her with adultery, and that a decree of divorce *à mensâ et thoro* was

(a) 2 Barn. & Cress. 547; 8 C. 4 Dow. & Ry. 11.

thereupon pronounced by that Court," was no answer to an action by the trustee for arrears of the annuity.

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Mr. Serjeant *Taddy* objected that the declaration contained no sufficient allegation of the execution of the indenture by the defendant, but a mere statement, that, by a certain indenture then and there *purporting to be made* between the defendant and the other persons therein mentioned, it was witnessed, that the defendant did not covenant, promise, and agree to and with the plaintiff in the manner therein mentioned.

Mr. Serjeant *Spawke*, *contra*.—The declaration is sufficient, it being averred that the indenture was sealed with the seal of the defendant; and, at all events, the defect (if any) could only be taken advantage of on special demurrer, and is cured by pleading over. In debt for rent, if the plaintiff does not shew any place where the lease was made, if the defendant, by his plea, admits the lease, the declaration is aided (a). So, if a bond be alleged in a count, and it is not said where it was made, and the defendant pleads *per aversum apud B.*, for he admits the bond was made (b). And it is a general rule, that, when the defendant has pleaded over, he cannot afterwards object to want of form in the declaration (c).

PER CURIAM.—The defendant by his plea admits the execution of the indenture. Whatever might have been the fate of the objection if taken on special demurrer, it is enough to say that it is cured by pleading over.

Judgment for the plaintiff.

(a) Com. Dig. title "Pleader,"
(C. 86), referring to Hob. 82—
2 Cro. 125, 682—2 Rol. Rep. 66.

(b) Dyer, 15 a.
(c) 3 Wilson, 297.

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Saturday,
Jan. 28th.

MILLER v. TRAVERS and Others.

The testator by his will, duly executed, devised "all his freehold and real estates whatsoever, situate in the county of *Limerick*, and in the city of *Limerick*," to certain trustees therein named, and their heirs. At the time of making his will he had no real estate in the county of *Limerick*, but he had a small real estate in the city of *Limerick*, and considerable real estates in the county of *Clare*:—*Held*, that parol evidence was not admissible to shew the testator's intention that his real estates in the county of *Clare* should pass by his will.

THE Lord Chancellor having required the assistance of Lord Chief Justice *Tindal* and Lord Chief Baron *Lyndhurst* in the decision of this case, the opinion of those two learned Judges was delivered, in the Court of *Chancery*, by—

Lord Chief Justice *TINDAL*.—In this case, the plaintiff, *John Riggs Miller*, filed his bill against the defendants for the purpose of establishing the will of the late Sir *John Edward Riggs Miller*, Bart., and for carrying into execution the trusts thereof. One of the defendants, *Elisabeth Wheatley*, was the sister and heiress-at-law of the testator. Upon the hearing of the cause, before his Honor, the Vice-Chancellor, after the answers of the several defendants, and, amongst others, the answer of the defendant *Elisabeth Wheatley*, had been put in, and witnesses examined, his Honor ordered, amongst other things—"That the parties should proceed to a trial at law on the following issue, *viz.* 'whether Sir *John Edward Riggs Miller*, Bart., did devise his estates in the county of *Clare* and in the county of *Limerick* and in the city and county of the city of *Limerick*, or either and which of them, to the trustees mentioned in his will, and their heirs'—in which issue the plaintiff in the cause was to be the plaintiff, and the heiress-at-law and her husband defendants."

Against this part of the decree the defendant *Elisabeth Wheatley* has appealed, and prays a re-hearing of the cause so far as respects that part.

Upon the hearing of this petition of appeal, the Lord Chancellor has been pleased to request the assistance of the Lord Chief Baron and myself; probably foreseeing, as the case has appeared in the result, that the propriety of

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directing an issue, at least as to the devise of the estates in the county of *Clare*, which was the main point in contention between these parties, would depend upon the nature of the evidence to be brought forward by the plaintiff, upon whom the affirmative in such issue would rest. For, if the evidence, and the only evidence which can possibly be brought forward by the plaintiff in support of his proposition, is of such a nature and description as to be inadmissible at the trial of the cause, it would be the duty of this Court to refuse the issue; it being manifestly to the advantage of both parties that such question should be decided in the first instance by the Judge sitting in equity, rather than that the very same question should be decided upon the very same principles of evidence by the Judge at *Nisi Prius*, after an expense and delay that must be worse than useless to all concerned in the suit.

Now, the main question between the parties, and the question that has formed the principal subject of argument before us, is this—whether parol evidence is admissible to shew the testator's intention that his real estates in the county of *Clare* should pass by his will. There is a subordinate question, as to the due execution of one sheet of the will, to which we shall afterwards advert, and upon which question an issue of a different and more limited form than that which has been at present directed, may perhaps properly be granted, if the plaintiff thinks fit to insist upon it. But the great contention between the parties is upon the question above proposed, as to the admissibility of parol evidence with respect to the estates in *Clare*. This question arises upon facts, either admitted or proved in the cause, which are few and simple.

The testator, by his will, duly executed, devised “all his freehold and real estates whatsoever, situate in the county of *Limerick* and in the city of *Limerick*,” to certain trustees therein named, and their heirs. At the time

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of making his will, he had no real estate in the county of *Limerick*, but he had a small real estate in the city of *Limerick*, and considerable real estates situate in the county of *Clare*.

The real estate in the city of *Limerick* is admitted to have passed under the devise; but the plaintiff contends that he is at liberty to shew by parol evidence that the testator intended his estates in *Clare* also to pass under the same devise.

The general character of the parol evidence which the plaintiff contends he is at liberty to produce, in order to establish such intention in the deviser, is this: first, that the estate in the city of *Limerick* is so small, and so disproportioned to the nature of the charges laid upon it, and the trusts which are declared, as to make it manifest that there must have been some mistake; and, in order to shew what that mistake was, the plaintiff proposes to prove, that, in the copy of the will which had been submitted to the testator for his inspection, and had been approved and returned by him, the devise in question stood thus: "All my freehold and real estates whatsoever situate in the counties of *Clare*, *Limerick*, and in the city of *Limerick*;" that the testator directed some alterations to be made in other parts of his will, and that the same copy of the will, accompanied with the proposed alterations, was sent by the testator's attorney to his conveyancer, in order that such alterations might be reduced into proper form; and that, upon such occasion, the conveyancer, besides making the alterations directed, did, by mistake, and without any authority, strike out the words "counties of *Clare*," and substitute the words "county of" in lieu thereof, so as to leave the devise in question in the same precise form as it now stands in the executed will. The plaintiff further proposes to prove that a fair copy of the will so altered was sent to the testator, who, after having kept it by him for some time, executed the

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same in the manner required by law, without adverting to the alteration above pointed out. Indeed, without entering more minutely into the detail of the evidence, it may be taken, for the purpose of the argument, that, if parol evidence was admissible by law, the evidence tendered in this case would be sufficient to establish beyond contradiction the intention of the testator to have been to include his estates in *Clare* in the devise to the trustees.

Upon the fullest consideration, however, it appears to the Lord Chief Baron and myself, that, admitting it may be shewn from the description of the property in the city of *Limerick*, that *some* mistake may have arisen, yet still, as the devise in question has a certain operation and effect, namely, the effect of passing the estate in the city of *Limerick*, and, as the intention of the testator to devise any estate in the county of *Clare* cannot be collected from the will itself, nor without altering or adding to the words used in the will, such intention cannot be supplied by the evidence proposed to be given.

It may be admitted, that, in all cases in which a difficulty arises in applying the words of a will to the thing which is the subject-matter of the devise, or to the person of the devisee, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence, may be rebutted and removed by the production of further evidence upon the same subject, calculated to explain what was the estate or subject-matter really intended to be devised, or who was the person really intended to take under the will: and this appears to us to be the extent of the maxim—*"Ambiguitas verborum latens, verificatione suppletur."*

The cases to which this construction applies will be found to range themselves into two separate classes, distinguishable from each other, and to neither of which can the present case be referred. The first class is, where the description of the thing devised, or of the devisee, is clear upon the face of the will; but, upon the death of the

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testator, it is found that there is more than one estate or subject-matter of devise, or more than one person whose description follows out and fills the words used in the will. As, where the testator devises his manor of *Dale*, and at his death it is found that he has two manors of that name, *South Dale* and *North Dale*: or, where a man devises to his son *John*, and he has two sons of that name. In each of these cases respectively parol evidence is admissible to shew which manor was intended to pass, and which son was intended to take (*a*). The other class of cases is that in which the description contained in the will of the thing intended to be devised, or of the person who is intended to take, is true in part, but not true in every particular—as, where an estate is devised called *A.*, and is described as in the occupation of *B.*, and it is found that, though there is an estate called *A.*, yet the whole is not in *B.*'s occupation; or where an estate is devised to a person whose surname or Christian name is mistaken, or whose description is imperfect or inaccurate: in which latter class of cases parol evidence is admissible to shew what estate was intended to pass, and who was the devisee intended to take, provided there is sufficient indication of intention appearing on the face of the will to justify the application of the evidence.

But the case now before the Court does not appear to fall within either of these distinctions. There are no words in the will which contain an imperfect, or indeed any description whatever of the estates in *Clare*. The present case is rather one in which the plaintiff does not endeavour to apply the description contained in the will to the estates in *Clare*, but, in order to make out such intention, is compelled to introduce new words and a new description into the body of the will itself. The testator devises all his estates in the county of *Limerick* and the city of

(*a*) Bac. Max. 23:—Hobart, 32.—*Edward Atkyn's case*, 8 Rep. 155.

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Limerick. There is nothing ambiguous in this devise on the face of the will. It is found, upon inquiry, that the testator has property in the city of *Limerick* which answers to the description in the will, but no property in the county. This extrinsic evidence produces no ambiguity, nor any difficulty in the application of the words of the will to the state of the property as it really exists. The natural and necessary construction of the will is, that it passes the estate which the testator has in the city of *Limerick*, but passes no estate in the county of *Limerick*, where he had no estate to answer that description.

The plaintiff, however, contends, that he has a right to prove that the testator intended to pass, not only the estate in the city of *Limerick*, but an estate in a county not named in the will, namely, the county of *Clare*; and that the will is to be read and construed as if the word *Clare* stood in the place of or in addition to that of *Limerick*. But this, it is manifest, is not merely calling in the aid of extrinsic evidence to apply the intention of the testator, as it is to be collected from the will itself, to the existing state of his property; it is calling in extrinsic evidence to introduce into the will an intention not apparent upon the face of the will. It is not simply removing a difficulty arising from a defective or mistaken description; it is making the will speak upon a subject on which it is altogether silent, and is the same in effect as the filling up a blank which the testator might have left in his will. It amounts, in short, by the admission of parol evidence, to the making of a new devise for the testator, which he is supposed to have omitted.

Now, the first objection to the introduction of such evidence is, that it is inconsistent with the rule which reason and sense lay down, and which has been universally established for the construction of wills, namely, that the testator's intention is to be collected from the words used in the will, and that words which he has not used cannot be

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added. *Denn v. Page (a)*. But it is an objection no less strong, that the only mode of proving the alleged intention of the testator is, by setting up the draft of the will against the executed will itself. As, however, the copy of the will which omitted the name of the county of *Clare* was for some time in the custody of the testator, and therefore open for his inspection, which copy was afterwards executed by him with all the formalities required by the statute of frauds, the presumption is, that he must have seen and approved of the alteration, rather than that he overlooked it by mistake. It is unnecessary to advert to the danger of allowing the draft of the will to be set up as of greater authority to evince the intention of the testator than the will itself, after the will has been solemnly executed, and after the death of the testator. If such evidence is admissible to introduce a new subject-matter of devise, why not also to introduce the name of a devisee altogether omitted in the will? If it is admissible to *introduce* new matter of devise, or a new devisee, why not to *strike out* such as are contained in the executed will? The effect of such evidence in either case would be, that the will, though made *in form* by the testator in his life-time, would *really* be made by the attorney after his death; that all the guards intended to be introduced by the statute of frauds would be entirely destroyed, and the statute itself virtually repealed.

Upon an examination of the decided cases on which the plaintiff has relied in argument, none will be found to go the length of supporting the proposition which he contends for; on the contrary, they will all be found consistent with the distinction above adverted to—that an uncertainty which arises from applying the description contained in the will either to the thing devised or to the person of the devisee, may be helped by parol evidence; but that a new subject-matter of devise, or a new devisee, where

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the will is entirely silent upon either, cannot be imported by parol evidence into the will itself. Thus, in the case of *Love v. Lord Huntingtower* (a), it was held that evidence of collateral circumstances was admissible, as, of the ages of the several devisees named in the will, of the fact of their being married or unmarried, and the like, for the purpose of ascertaining the true construction of the will. Such evidence, it is to be observed, is not admitted to introduce new words into the will itself, but merely to give a construction to the words used in the will consistent with the real state of his property and family: the evidence is produced to prove facts which, according to the language of Lord Coke (b), “stand well with the words of the will.”

The case of *Standen v. Standen* (c) decides no more than that a devise of all the residue of the testator's real estate, where he has no real estate at all, but has a power of appointment over real estate, shall pass such estate over which he has the power, though the power is not referred to. But this proceeds upon the principle that the will would be altogether inoperative, unless it is taken that, by the words used in the will, the testator meant to refer to the power of appointment. The case of *Mosley v. Massey and Others* (d), does not appear to bear upon the question now under consideration. After the parol evidence had established that the local description of the two estates mentioned in the will had been transposed by mistake, the county of *Radnor* having been applied to the estate in *Monmouth*, and *vice versa*—the Court held that it was sufficient to be collected from the words of the will itself, which estate the testator meant to give to the one devisee, and which to the other, independently of their local description: all, therefore, that was done was, to reject the local description as unnecessary, and not to import any new

(a) 4 Russ. Rep. 581, n.

(b) 8 Rep. 155.

(c) 2 Ves. 589.

(d) 8 East, 149.

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description into the will. In the case of *Selwood v. Mildmay* (a), the testator devised to his wife part of his stock in the *4l. per cent.* Annuities of the Bank of England; and it was shewn by parol evidence, that, at the time he made his will, he had no stock in the *4l. per cent.* Annuities, but that he had some, which he had sold out, and had invested the produce in Long Annuities: and it was held that the bequest was in substance a bequest of stock, using the words as a denomination, not as the identical *corpus* of the stock; and, as none could be found to answer the description but the Long Annuities, it was held that such stock should pass rather than the will be altogether inoperative. This case is certainly a very strong one; but the decision appears to us to range itself under the head that "*falsa demonstratio non nocet*," where enough appears upon the will itself to shew the intention, after the false description is rejected.

The case of *Goodtitle d. Radford v. Southern* (b), falls more closely within the principle last referred to. A devise of "all that my farm called *Trogues Farm*, now in the occupation of *A. C.*" Upon looking out for the farm devised, it is found that part of the lands which constituted *Trogues Farm* are in the occupation of another person. It was held that the thing devised was sufficiently ascertained by the devise of "*Trogues Farm*," and that the inaccurate part of the devise might be rejected as surplusage. The case of *Day v. Trigg* (c) ranges itself precisely in the same class. A devise of all "the testator's freehold houses in *Aldersgate Street*," when in fact he had no freehold, but had leasehold houses there: the devise was held, in substance and effect, to be a devise of his *houses* there; and that, as there were no freehold houses there to satisfy the description, the word "freehold" should rather be rejected than the will be totally void. But neither of these

(a) 3 Ves. 306. (b) 1 Mau. & Selw. 299. (c) 1 P. Wms. 286.

cases affords any authority in favour of the plaintiff; they decide only, that, where there is a sufficient description in the will to ascertain the thing devised, a part of the description which is inaccurate may be rejected, not that any thing may be added to the will: thus following the rule laid down by Lord Chief Justice *Anderson* (a)—“An averment to take away surplusage is good, but not to increase that which is defective in the will of the testator.”

On the contrary, the cases against the plaintiff's construction appear to bear more closely on the point. In the first place, it is well established, that, where a complete *blank* is left for the name of a legatee or devisee, no parol evidence, however strong, will be allowed to fill it up as intended by the testator. *Hunt v. Hori* (b)—and many other cases.

Now, the principle must be precisely the same, whether it is the person of the devisee, or the estate or thing devised, which is left altogether in blank. And it requires a very nice discrimination to distinguish between the case of a will where the description of the estate is left altogether in blank, and the present case, where there is a total omission of the estates in *Clare*.

In the case of *Doe d. Oxenden v. Chichester* (c), it was held by the *House of Lords*, in affirmance of the judgment below, that, in the case of a devise of “my estate of *Ashton*,” no parol evidence was admissible to shew that the testator intended to pass not only his lands in *Ashton*, but also in the adjoining parishes, which he had been accustomed to call by the general name of his *Ashton* estate. The Lord Chief Justice of the *Common Pleas*, in giving the judgment of all the Judges, says—“If a testator should devise his lands of or in *Devonshire* or *Somersetshire*, it would be impossible to say that you ought to receive evidence that his intention was to devise lands out of those

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(a) Godbolt, 131. (b) 3 Bro. C. C. 311. (c) 4 Dow, P. C. 65.

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counties." Lord *Eldon*, then Lord Chancellor, had previously stated in substance the same opinion. The case so put by Lord *Eldon* and the Lord Chief Justice of the *Common Pleas* is the very case now under discussion. But the case of *Newburgh v. Newburgh*, decided in the House of Lords on the 16th of *June*, 1825, appears to me to be in point with the present. In that case, the appellant contended that the omission of the word "*Gloucester*" in the will of the late Lord *Newburgh* proceeded upon a mere mistake, and was contrary to the intention of the testator at the time of making his will, and insisted that she ought to be allowed to prove, as well from the context of the will itself as from other extrinsic evidence, that the testator intended to devise to her an estate for life, as well in the estate in *Gloucester*, which was not inserted in the will, as in that in the county of *Sussex*, which was mentioned therein. The question—"whether parol evidence was admissible to prove such mistake, for the purpose of correcting the will, and entitling the appellant to the *Gloucester* estate, as if the word '*Gloucester*' had been inserted in the will"—was submitted to the Judges; and Lord Chief Justice *Abbott* declared it to be the unanimous opinion of those who had heard the argument, that it could not.

As well, therefore, upon the authority of the cases, and more particularly of that which is last referred to, as upon reason and principle, we think the evidence offered by the plaintiff would be inadmissible upon the trial of the issue, and that it would therefore be useless to grant the issue in the terms directed by the Vice-Chancellor.

Upon the second point that has been made, *viz.* whether the sheet of the will numbered 20 forms any part of the will—although we cannot but entertain a strong opinion, from the evidence in the cause, as to the result of such an issue, still, as it is a question merely of fact, and one upon which by possibility further evidence might be produced,

we think an issue might properly be allowed, directed and limited to the precise investigation of that single fact.

Some arguments were offered by the plaintiff's counsel upon the construction of the will from the context of the whole instrument; and it was contended, that, without the introduction of any extrinsic evidence, the estates in *Clare* would pass under the will: but, as the state of the cause at the time of the hearing did not admit of such discussion, and as the counsel for the defendants disclaimed entering upon it at present, we have, in fact, not heard the parties on that point, and we therefore think it right to forbear offering any opinion thereon.

The LORD CHANCELLOR concurring, the order of the Vice-Chancellor was—

Reversed.

LEWIS v. KNIGHT.

Monday,
Jan. 30th.

THE defendant in this case, a *feme covert*, having been arrested at the suit of the plaintiff, who was at the time aware of her coverture, her attorney gave the sheriff an undertaking to put in bail.

An undertaking by an attorney to give a bail-bond to the sheriff is contrary to the statute 23 Hen. 6, c. 10, and void.

Mr. Serjeant *Merewether*, on a former day in this term, obtained a rule *nisi* to cancel the undertaking, and to stay the proceedings, upon the defendant's filing a common appearance.

Mr. Serjeant *Wilde* now shewed cause.—An undertaking of an attorney to give a bail-bond in due time, is contrary to the statute 23 Hen. 6, c. 10, and void (a), even

(a) *Sedgworth v. Spicer*, 4 East, 568; S. C. 2 Smith, 305.

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if the undertaking be given before the arrest is made, and it is not in the power of the officer to execute the writ (a). Here, the defendant is not in custody, neither has she entered into any obligation by which any one is bound: the undertaking of the attorney is a mere nullity.

Mr. Serjeant *Merewether*, in support of his rule, submitted that the defendant was entitled to a stay of all possible proceedings upon the arrest, on her entering a common appearance.

Lord Chief Justice TINDAL.—The undertaking of the attorney is illegal and void. The defendant has given no bail-bond. She has never been brought into Court. How, then, are we to enter an appearance for her? This rule must be discharged, with costs.

Mr. Justice BOSANQUET.—The defendant stands in need of no favour from the Court. The attorney cannot render her pursuant to the undertaking he has given to the sheriff, for, the cases cited shew that such an undertaking is contrary to the statute, and therefore void.

The rest of the Court concurring—

Rule discharged, with costs (b).

(a) *Parker v. England*, 2 Smith, 52.

(b) See *Rogers v. Reeves*, 1 Term Rep. 418, where it was held that an undertaking of an attorney given to the *plaintiff* in order

to procure the discharge of the defendant, to put in bail, or to pay the debt, is not within the statute 23 Hen. 6, c. 10, not being given to the sheriff.

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HOWELL v. POWLETT.

IN this case issue was joined in last *Michaelmas* Term. The plaintiff gave notice of trial for the Sittings after that term; but did not proceed to trial.

Mr. Serjeant *Andrews*, on a former day in this term, obtained a rule *nisi* for judgment as in case of a nonsuit.

Mr. Serjeant *Wilde* shewed cause.—In *Da Costa v. Ledstone* (a), it was held that judgment as in case of a nonsuit, for not proceeding to trial, pursuant to notice, cannot be moved for till the third term after that in which issue is joined, where the affidavit is general, that issue was joined in that term. According to the statute 14 *Geo.* 2, c. 17, s. 1, judgment as in case of a nonsuit can only be signed where, after issue joined, the plaintiff neglects to bring such issue to trial “according to the course and practice of the Court.” Now, here, according to the course and practice of the Court, the plaintiff was not compellable to give notice of trial till the present term; and therefore the defendant is not yet at liberty to move for judgment as in case of a nonsuit.

Mr. Serjeant *Andrews*, in support of his rule, referred to *Hay v. Howell* (b), where it was held, that, if a plaintiff give notice of trial for the Sittings in the term in which issue is joined, and do not proceed to trial accordingly, the defendant may move for judgment as in case of a nonsuit in the succeeding term.

Lord Chief Justice TINDAL.—When the plaintiff gives

If issue is joined early enough in a term to enable the plaintiff to give notice of trial for the sittings after the term, although he is not compellable to do so, yet if he do give notice he is bound by it; and, if he omit to try accordingly, the defendant may move for judgment as in case of a nonsuit in the following term.

(a) 2 H. Blac. 558.

(b) 2 New Rep. 397.

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notice of trial, he is bound to proceeding according to the notice; and, on his default, the defendant is entitled to move for judgment as in case of a nonsuit. The plaintiff has chosen to expedite the cause; and he cannot be allowed to recede.

Mr. Justice PARK.—Although the plaintiff was not obliged to give notice of trial in *Michaelmas* Term, yet, as he elected to do so, he cannot now be permitted to withdraw it.

Mr. Justice BOSANQUET.—If the plaintiff in this case has given notice of trial earlier than the practice of the Court requires, he is nevertheless bound to abide by it.

Mr. Justice ALDERSON concurred.

Mr. Serjeant *Wilde* offered a peremptory undertaking to try at the next Sittings; and the rule was thereupon—

Discharged (a).

(a) See *Munt v. Tremamondo*, 4 Term Rep. 557, where it was held, that, if issue in a *London* cause be joined early enough in a term to enable the plaintiff to give notice of trial for the Sittings after that

term, the defendant is not entitled to judgment as in case of a nonsuit, for not proceeding to trial, *unless* the plaintiff has in fact given notice of trial.

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MOUNT v. LARKINS.

THIS was an action of *assumpsit* on a policy of assurance on the ship *Aquila*, *Watson*, master, at and from *Singapore* and *Batavia* to the ship's port or ports of discharge in *Europe*. The grounds of defence were, *first*, that the ship was not seaworthy, *secondly*, that there had been such delay in the commencement of the voyage insured as avoided the policy. The cause was set down for trial on the 28th *October*, 1829, but did not come on to be tried till the 22nd *April*, 1830. A verdict was found for the plaintiff. In the following term the defendant obtained a rule nisi for a new trial; when it was agreed that the finding of the jury should be put into the shape of a special verdict. The special verdict was argued in *Trinity* Term, 1831, and in *Michaelmas* Term last (*viz.* on the 25th *November*), the Court pronounced judgment for the defendant (a), on the ground that there was unreasonable and unjustifiable delay between the making of the policy and the commencement of the risk intended to be insured against.

On the 6th *October*, 1829, the defendant subpoenaed *Watson*, the master of the *Aquila*, for the purpose of shewing that the plaintiff, the owner, was not cognizant of the delay, and also for the purpose of answering a charge of barratry contained in one of the counts of the declaration. This witness was kept in *London* by the defendant from the 6th *October*, 1829, to the 25th *November*, 1831, to secure his attendance, in case the Court should have directed a new trial. *Watson* was not examined at the trial.

On the taxation of the defendant's costs, he claimed to be allowed a sum of 219*l.* alleged to have been paid by

On taxation of the defendant's costs, in an action on a policy of assurance, the Prothonotary allowed for the subsistence of the master of the vessel from the time he was subpoenaed till the trial; but refused to allow for his further detention pending a rule for a new trial upon a point to which his evidence was not applicable. The witness was a master in the royal navy, on half-pay; and was not examined on the trial:—The Court refused to direct the Prothonotary to review his taxation.

(a) *Ante*, p. 165.

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him to *Watson* during the period of his detention, for his subsistence, and as a compensation for the loss of an employment in the merchant service, which he had been obliged to decline in consequence of the *subpoena*. On the part of the plaintiff, the allowance of this sum was objected to, on the grounds that, being a master and commander in the Royal Navy, and in receipt of half-pay, he could not legally engage in the merchant service without permission of the Lords of the *Admiralty*.

The Prothonotary, Mr. *Watlington*, allowed the sum of 94*l.* 10*s.* for the subsistence of the witness from the day he was subpoenaed to the 22nd *April*, 1830, the day of the trial.

Mr. Serjeant *Taddy*, for the plaintiff, on a former day in this term, obtained a rule *nisi* that the Prothonotary might be directed to review his taxation.—He submitted that the defendant was not, under the circumstances, entitled to any allowance on account of *Watson*.

Mr. Serjeant *Wilde*, for the defendant, also obtained a similar rule.—He contended that the allowance made by the Prothonotary on account of *Watson* was too small.

The learned Serjeant now shewed cause against the first rule, and in support of the second.—It was necessary that the witness in question should be present at the trial; and the keeping him here in anticipation of another trial being directed, was a reasonable precaution on the part of the defendant. In *Berry v. Pratt (a)*, where the captain of a merchant ship, domiciled in this country, was detained by the plaintiff for a considerable time to give evidence in a cause, but before issue was joined or notice of trial given, it was held that the Master was at liberty, in taxing

(a) 1 Barn. & Cress, 276; *S. C. Anonymous*, 2 Dow. & Ryl. 424.

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the costs, to allow the expenses of maintaining the witness during such detention. And in the late case of *Loneragan v. The Royal Exchange Assurance Company* (a), a foreigner and captain of a vessel, on being required to come to this country to give evidence for the plaintiffs in a particular cause, refused to do so unless he were compensated for his loss of time, which the plaintiffs' agent abroad promised him should be done, this Court held that he was entitled to have a reasonable sum allowed him by way of compensation for such loss; and the Prothonotary, having disallowed the claim, was directed to review his taxation. In the present case, it was a matter of necessary precaution in the defendant to detain the witness here until the special verdict was disposed of, as there might have been a further inquiry.

Mr. Serjeant *Taddy*, *contra*.—The Prothonotary has already allowed too much; at all events, there is no pretence for saying that more should have been allowed. The defendant had no right to keep the witness here at the expense of the plaintiff, on the mere speculation that there might eventually be a new trial, particularly as he was not called on the former trial. Besides, the witness was not brought to this country for the mere purpose of the cause, as was the case in *Berry v. Pratt* and *Loneragan v. The Royal Exchange Assurance Company*; nor was the witness without other means of subsistence. In the latter case, the witness was brought from the *Havannah* for the purpose of giving evidence in the cause, and whilst here he had no employment or means of support other than the allowance made to him by the plaintiffs. Here, the witness was a master in the Royal Navy, on half-pay, and therefore could not take the command of a ves-

(a) 5 Moore & Payne, 805; S. C. 7 Bing. 725.

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sed in the merchant service, unless by the order or permission of the Lords of the *Admiralty*. If his evidence had been material to the defendant, his examination might have been taken by the Prothonotary, or upon interrogatories, under the statute 1 *Will.* 4, c. 22.

Lord Chief Justice TINDAL.—It appears to me that no ground has been shewn on either side for sending this matter back to the Prothonotary. With respect to the motion for reducing the allowance made to the witness—He might have been a material witness for the defendant, and therefore might reasonably be held in attendance. We must not speculate too nicely in these cases as to the necessity of securing witnesses: and the Prothonotary is to exercise his discretion as to the amount of the allowance. The Court of *King's Bench*, in the case of *Berry v. Pratt*, confirmed the Master's allowance of subsistence to a common mariner who was residing in this country, but, in consequence of his detention for the purpose of the trial, had lost an opportunity of going abroad. The fact of the witness in this case being a master in the navy makes no difference: he might still be employed in the merchant service. I therefore think there is no ground for saying that the sum allowed by the Prothonotary was too large: neither do I think the sum ought to be increased. It has been contended on the part of the defendant, that it was no more than a necessary and reasonable precaution on his part to detain the witness until the rule that was pending was disposed of: but, at a very early stage of the proceedings, it was intimated to the parties that the new trial, if granted, would be confined to the question of seaworthiness; and this witness was merely proposed to be called to negative the alleged barratry, and to explain the delay that had taken place in the course of the voyage out. Upon the whole I think the Prothonotary has exercised a proper dis-

cretion, and there is no ground for calling upon him to review the taxation.

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The rest of the Court concurring—

Rule discharged.

BARTHOLOP and Others, Assignees of YATES, a Bankrupt,
v. ANDERTON.

Monday,
Jan. 30th.

THE defendant in this cause gave notice that he intended at the trial to dispute the petitioning-creditor's debt, the trading of the bankrupt, *Yates*, and the act of bankruptcy. When the cause came on for trial, before Mr. Justice *James Parke*, at the last *Assizes* at *York*, and the plaintiff's counsel had opened his case, a reference was proposed on the part of the defendant, which was acceded to by the plaintiff, the defendant undertaking to admit before the arbitrator the petitioning-creditor's debt, the trading, and the act of bankruptcy. The order of reference contained the following clause: "And it is agreed between the parties, that the bankruptcy of *Yates* shall be admitted, and the arbitrator shall state upon his award any point of law that he shall think fit for the consideration of the Court, or that either of the parties shall require."

In an action by the assignees of a bankrupt, the defendant gave notice of his intention to dispute the petitioning-creditor's debt, the trading, and the act of bankruptcy. At the trial the cause was referred to arbitration, the defendant undertaking to admit before the arbitrator the debt, trading, and bankruptcy: —*Held*, that the Judge had no power to certify for the costs occasioned by the notice, under the statute 6 Geo. 4, c. 16, s. 90, the cause not having been tried by him.

The arbitrator having directed a verdict to be entered for the defendant, an application was made to Mr. Justice *Parke*, to grant a certificate of the admission at the trial of the debt, trading, and bankruptcy, under the 90th section of the 6 Geo. 4, c. 16 (a). The learned Judge grant-

(a) Which enacts—"That, in any action by or against any assignee, or in any action against any commissioner or person acting under the warrant of the commissioners, for any thing done as

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ed the certificate, with a view to bring the question under the consideration of the Court.

Mr. Serjeant *Wilde*, on a former day in this term, accordingly obtained a rule *nisi* that the certificate might be set aside, or that the Prothonotary might be directed to proceed with the taxation of the defendant's costs, notwithstanding the certificate.—He submitted that the Judge, not having tried the cause, was not authorized by the statute to certify.

Mr. Serjeant *Jones* now shewed cause.—It was not necessary that the cause should be wholly tried before the Judge, to enable him to certify, as in the case of a certificate under the 34th section of the jury act, 6 *Geo.* 4, c. 50. When the trading, debt, and bankruptcy of the bankrupt were admitted, there was nothing further to be done: no subsequent developement of facts could affect the mind of the Judge as to the propriety or impropriety of granting the certificate. There can be no doubt but

such commissioner, or under such warrant, no proof shall be required at the trial of the petitioning-creditor's debt or debts, or of the trading or act or acts of bankruptcy respectively, unless the other party in such action shall, if defendant, at or before pleading, and, if plaintiff, before issue joined, give notice in writing to such assignee, commissioner, or other person, that he intends to dispute some and which of such matters; and in case such notice shall have been given, if such assignee, commissioner, or other person, shall prove the matter so disputed, or the other party admit the same,

the Judge before whom the cause shall be tried may (if he thinks fit) grant a certificate of such proof or admission; and such assignee, commissioner, or other person, shall be entitled to the costs to be taxed by the proper officer occasioned by such notice, and such costs shall, if such assignee, commissioner, or other person shall obtain a verdict, be added to the costs, and, if the other party shall obtain a verdict, shall be deducted from the costs which such other party would otherwise be entitled to receive from such assignee, commissioner, or other person."

that the Judge would have certified had he heard the case through.

Mr. Serjeant *Wilde*, *contra*, was stopped by the Court.

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Lord Chief Justice TINDAL.—The question in this case arises upon the construction of the 90th section of the statute 6 Geo. 4, c. 16, which enacts, that where, in certain cases, notice has been given to dispute the petitioning-creditor's debt, the trading, or the act of bankruptcy, if the matter so disputed shall be proved or admitted, "the Judge *before whom the cause shall be tried* may (if he thinks fit) grant a certificate of such proof or admission." The statute clearly intended to vest in the Judge a discretionary power: no language can be stronger to shew that it is in the discretion of the Judge to grant or to refuse the certificate. The Judge, however, cannot properly exercise this discretion unless he tries the whole cause. It is said that no doubt can arise as to the propriety of granting the certificate where the bankruptcy is admitted, as here. But a variety of cases may be supposed, where, although the trading and act of bankruptcy are admitted, it would not be proper to certify; for instance, the party might have been deceived as to the time of the act of bankruptcy, and might only learn it at the time of trial; or it might be proposed to dispute the bankruptcy, upon depositions which could not be given in evidence in consequence of some defect of form. The 34th section of the statute 6 Geo. 4, c. 50, the jury act, contains words similar to those used in the clause in question: it enacts "that the party who shall apply for a special jury shall pay the fees for striking such jury, and all the expenses occasioned by the trial of the cause by the same, and shall not have any further or other allowance for the same, upon taxation of costs, than for a common jury, unless the Judge before whom the cause is tried shall, immediately after the ver-

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dict, certify, under his hand, upon the back of the record, that the same was proper to be tried by a special jury:" and it has never been the practice to allow such certificate where the cause has been referred.

Mr. Justice PARK.—The certificate was signed by my Brother *Parke* in this case in order that the question might be brought before the Court. I am of opinion that the clause under consideration only gives a discretionary power to the Judge to certify where he has tried the cause. The present case was not tried before Mr. Justice *Parke*; he merely heard the opening of the plaintiff's case, and then the parties consented to a reference.

Mr. Justice BOSANQUET.—The act gives the Judge who tries the cause power to exercise his discretion as he shall think fit. In this instance the learned Judge did not hear the cause. The admission of the bankruptcy was not made in the course of the trial; but only on condition of the matters being referred to an arbitrator. If the cause had proceeded, the bankruptcy might possibly have been disputed with effect.

Mr. Justice ALDERSON.—When it is admitted that the Judge is to *exercise a discretion*, there is an end of the question; for he cannot be said to exercise a discretion unless he has heard the cause. Admissions are frequently made for the mere purpose of argument. In such a case as this, I should understand that the bankruptcy was admitted, because the defendant had a good answer to the action on the merits, and therefore did not chuse to put the plaintiff to proof of the act of bankruptcy.

Rule absolute.

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CANTWELL v. The Earl of STIRLING.

THE declaration in this case (which was an action of *assumpsit* on a bill of exchange) was of *Michaelmas* Term, 2 Will. 4. The defendant pleaded in abatement on the 8th November. To this plea the plaintiff demurred, and the defendant joined in demurrer; and, upon argument on the 25th instant, the Court pronounced judgment of *respondeat ouster* (a). No terms of pleading were imposed upon the defendant; but on the 27th he pleaded *non assumpsit*. On the same day, the plaintiff signed judgment for want of a plea, and at the same time took out a rule to compute principal and interest.

A defendant is entitled to four days' time for pleading after a judgment of *respondeat ouster*.

Mr. Serjeant D'Oyley, upon an affidavit of these facts, yesterday obtained a rule *nisi* that the interlocutory judgment and all proceedings thereon might be set aside for irregularity.—He submitted that the defendant had four days' time to plead after the judgment of *respondeat ouster*, and consequently that the plaintiff could not be entitled to sign judgment till after the 29th.

Mr. Serjeant Merewether now shewed cause, upon an affidavit which stated that the plaintiff had been informed by an officer of the Court that he might sign judgment immediately.—He contended that, after a judgment of *respondeat ouster*, the defendant is bound to plead *instantly*, unless time is granted him by the indulgence of the Court.

PER CURIAM.—The judgment is clearly irregular. The defendant was entitled to four days' time to plead (b).

Rule absolute, without costs.

(a) *Ante*, p. 297.

(b) See Tidd's Practice, 9th edit. p. 671.

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By an order of *Nisi Prius*, it was agreed that a verdict should be entered for the plaintiff for nominal damages and the costs of the action, and that the plaintiff should pay the defendant a sum of 70*l.* due to her from him:—The Court permitted the 70*l.* to be set off against the costs in the cause.

AUGUSTUS NEWTON v. CAMILLA NEWTON.

THIS was an action on the case for a libel. Upon the cause coming on for trial, an apology was offered and accepted, but there was some contention as to a sum of 70*l.* alleged to be due from the plaintiff to the defendant. Eventually, it was agreed that the verdict should be entered for the plaintiff, for nominal damages, and that the 70*l.* should be paid by him. An order of *Nisi Prius* was accordingly drawn up as follows:—

“It is ordered, with the consent of all parties, their counsel and attornies, that a verdict shall be entered for the plaintiff, damages one shilling, costs 40*s.*, and that the plaintiff shall pay to the defendant the sum of 70*l.*, if the defendant shall state in writing that such sum is due from him to her, and shall make an order for the payment thereof; and that either party shall be at liberty to make this order a rule of Court.”

The following order was afterwards addressed by the defendant to the plaintiff:—

“Sir,—I hereby request you to pay to my agents, Messrs. *Alexander*, the sum of 70*l.*, which is due from you to me.

Camilla Newton.”

Mr. Serjeant *Merewether*, on the part of the defendant, on a former day in this term, obtained a rule calling on the plaintiff to shew cause why the above sum of 70*l.* should not be set off against the plaintiff's costs of the action, which had been taxed at 80*l.*—10*l.* had been tendered.

Mr. Serjeant *Wilde* now shewed cause.—Although debts of the same degree may be mutually set off, a simple con-

tract debt cannot be set off against a debt due upon a judgment. This was expressly decided in *Philipson v. Caldwell (a)*.

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Mr. Serjeant *Mercwether*, in support of his rule, submitted that the set-off ought to be allowed, inasmuch as the sum claimed by the defendant was due under an order made in the cause wherein the costs accrued to the plaintiff.

Lord Chief Justice TINDAL.—The question arises upon the construction of an instrument giving mutual remedies to the parties in the cause. They agree to enter into a rule of Court, whereby the plaintiff is to have a verdict and the costs of the action, and the defendant is to receive 70%; and the Court is called upon to supply that which is mere matter of form, *vis.* the mode of enforcing obedience to the order. I see no reason why the two claims should not be set off one against the other.

The rest of the Court concurring—

Rule absolute.

(a) 6 Taunt. 176.

MASTERMAN and Others v. JUDSON.

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THIS was an action on the case for the non-attendance of the defendant as a witness for the plaintiffs, in obedience to a *subpoena*.

In an action against a witness for not obeying a *subpoena*, the declaration, after reciting the writ

of subpoena, stated that the plaintiffs caused the said writ "to be made known to, and shewn to the defendant, and caused a copy to be left with the defendant of the said writ of *subpoena*." When the cause came on for trial, it appearing that the writ of *subpoena* contained the names of other witnesses besides the defendant, and the copy served upon him was therefore not a full copy of the writ, the Judge caused the record to be amended thus—"caused a copy to be left with the defendant of so much of the said writ of *subpoena* as related to the said defendant."—*Held*, that the amendment was warranted by the statute 9 Geo. 4, c. 15.

Held also, that the omission of an averment in the declaration that the plaintiff had a good cause of action against the defendant in the original suit, could not be taken advantage of in arrest of judgment.

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The declaration stated that the plaintiffs, before the committing the grievances by the defendant thereafter mentioned, to wit, in *Hilary* Term, 1831, before Sir *Nicholas Conyngham Tindal*, knight, and his companions, Justices of the Bench, at *Westminster*, impleaded one *John Malin* in a plea of trespass to the damage of the said plaintiffs of 100*l.*; and such proceedings were thereupon had; that, afterwards, to wit, at the Sittings at *Nisi Prius* holden at *Hertford* in the county of *Hertford*, on the 2nd of *March*, 1831, before the Honorable Sir *John Bayley* and the Honorable Sir *William Garrow*, knights, a certain issue before then joined in the said plea between the said plaintiffs and the said *John Malin* came on to be tried by a jury of the county; and also that, on the 31st of *January*, in the year aforesaid, the said plaintiffs prosecuted out of the Court aforesaid his Majesty's writ of *subpoena*, directed to the said defendant and others, commanding them and every of them, that, all other things set aside, &c., they should appear before the Justices assigned to take the Assizes, &c., at the said town of *Hertford*, in the said county, on *Wednesday*, the 2nd day of *March* then next, by nine of the clock in the forenoon, and so from day to day, &c., to testify, &c., in a certain action then in the said Court before the said King's Justices depending between the plaintiffs and the said *John Malin*, of a plea of trespass, on the part of the said plaintiffs; and that they or any of them should in nowise omit, under the penalty of every of them of 100*l.*: which said writ the said plaintiffs, on the 19th of *February*, in the year aforesaid, caused to be made known to and shewn to the said defendant, and caused a copy to be left with the said defendant of [so much of] the said writ of *subpoena* [as related to the said defendant], and paid to the said defendant the sum of 10*l.* for the costs of his attendance as a witness; and although the said defendant could have given material evidence for the said plaintiffs on the said trial against the said *John*

Malin, yet the said defendant would not appear on the trial of the said issue, although he had no lawful cause or impediment to the contrary; and by reason thereof, and on no other account whatsoever, the said plaintiffs were nonsuited: and such proceedings were thereupon had, that afterwards, to wit, in *Easter Term*, in the year aforesaid, it was adjudged by the said Court that the said *John Malin* should recover against the said plaintiffs 25*l.* 6*s.* for his costs and charges by him laid out in and about his defence in that behalf: by means of which said several premises the said plaintiffs were not only forced to pay the said *John Malin* the said sum of 25*l.* 6*s.*, together with the costs of levying the same, amounting to the sum of 10*l.*, but were also greatly hindered and delayed in the recovery of their damages in the plea aforesaid, and did necessarily incur a great expense, amounting to the sum of 100*l.* in and about prosecuting the said suit, which the said plaintiffs are liable to pay, and are by means of the premises otherwise greatly injured: to the plaintiffs' damage of 200*l.*

At the trial, before Lord Chief Justice *Tenterden*, it appearing that there was a variance between the copy of the *subpoena* served upon the defendant and that set out upon the record—the copy containing only the names of the defendant and *John Doe*, and the original writ of *subpoena* being directed to the defendant and two other persons—his Lordship ordered that the record might be amended by the insertion of the words within brackets in the declaration, in pursuance of the provision of the statute 9 Geo. 4, c. 15—“That it shall and may be lawful for every Court of record holding plea in civil actions, any Judge sitting at *Nisi Prius*, and any Court of oyer and terminer and general gaol delivery in *England, Wales, the town of Berwick-upon-Tweed, and Ireland*, if such Court or Judge shall see fit so to do, to cause the record on which any trial may be pending before any such Judge or Court in any civil action, or in any indictment or information for any

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misdeemeanor, when any variance shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular by some officer of the Court, on payment of such costs, if any, to the other party as such Judge or Court shall think reasonable; and thereupon the trial shall proceed as if no such variance had appeared: and in case such trial shall be had at *Nisi Prius*, the order for the amendment shall be indorsed on the *postea*, and returned together with the record; and thereupon the papers, rolls, and other records of the Court from which such record issued shall be amended accordingly."

A verdict was found for the plaintiff—damages, 50*l*.

Mr. Serjeant *Taddy*, in the last term, obtained a rule *nisi* that this verdict might be set aside and a new trial had, on the ground that the statute did not authorize the amendment made. He submitted that the amendment would operate a hardship upon the defendant, inasmuch as it consisted of the insertion of an independent fact, which, if put upon the record before, might have been demurred to (*a*).

Mr. Serjeant *Wilde* shewed cause.—The statute in

(*a*) He also moved in arrest of judgment, on the ground that there was no allegation in the declaration that the plaintiffs had a good cause of action against *Malin*, the defendant in the original action. In support of this objection, were cited *Goodwin v. West*, Sir W. Jones, 430; *Cro. Car.* 522, 540—*Maddison v. Shaw*, 5 *Mod.* 355—*Aston's Entries*, 90, 91,—*Vidian's Entries*, 16, 60—

2 *Wms. Saund.* 151—*Alexander v. M'Auley*, 4 *Term Rep.* 611—and *Pearson v. Illes*, 2 *Doug.* 556. *Contrà*—1 *Wms. Saund.* 228 a (c)—*M'Murdo v. Smith*, 7 *T. R.* 518—*Pippet v. Hearn*, 5 *Barn. & Ald.* 634—and *Godefroy v. Jay*, 5 *Moore & Payne*, 284; *S. C.* 7 *Bing.* 413. But the Court held that the omission of such averment could not be taken advantage of in arrest of judgment.

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question was passed for the furtherance of justice, and, being remedial, must be liberally construed. The amendment of the *Nisi Prius* record is in the discretion of the Judge only; the Court has no control over it. The amendment made in the present case was warranted both by the spirit and the letter of the act. In *Briant v. Eicke* (a), a recital that a judgment was recovered in the Court of *King's Bench*, was amended by substituting the *Common Pleas*.

Mr. Serjeant *Taddy* and Mr. Serjeant *Stephen*, in support of the rule.—The amendment in question was not a mere amendment of a mis-recital, to prevent a variance; it was an introduction of a new and independent fact; the copy of the *subpœna* was not set out upon the record: and the matter so introduced might have been demurred to if the defendant had had an opportunity; for, it leaves to the jury that which could only be judged of by the Court, *viz.* how much of the instrument related to the defendant.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court:—

Upon the point reserved in this case for further consideration, *viz.* whether the amendment made upon the record of *Nisi Prius* at the trial of this cause was an amendment authorized by the late act of 9 *Geo.* 4, c. 15—we think such amendment falls within the meaning and construction of the act, and is fully authorized by the same.

The declaration, after stating that the writ of *subpœna* was issued in the cause, proceeded to aver “that the plaintiffs caused the said writ to be made known and shewn to the defendant, and caused a copy to be left with him.”

(a) 1 *Moody & Malkin*, 359.

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Upon the trial it appeared that there was a variance between the copy, or ticket, as it is usually termed, which had been left with the witness, and the original writ of *subpoena*, the former purporting to be addressed to the defendant and *John Doe* alone, whereas the original *subpoena*, when produced, appeared to be addressed, not only to the defendant, but also to two other real persons. The plaintiffs praying the Judge who tried the cause at *Nisi Prius* to order an amendment to be made under the act above referred to, he directed an amendment to be made in these words—"caused a copy of so much of the said writ of *subpoena* as related to the defendant to be left with him." The trial then proceeded on the amended declaration, and a verdict was found for the plaintiffs.

Two objections are made by the defendant to the authority of the learned Judge to direct this amendment—first, that this is not an amendment of the record to prevent a variance between any matter in writing produced in evidence, and the recital or setting forth thereof upon the record: but it is the insertion of a new and distinct allegation of an independent fact—secondly, that the defendant might have demurred to the allegation as it now stands, if it had appeared in the declaration originally; and that he ought not to lose that advantage by its being first put upon the record when the cause is before the jury.

As to the first objection, however, it appears to us, that, though the allegation introduced by that amendment may, at first sight, seem to be an allegation of a new fact, yet, upon looking more accurately at the effect of the amendment, it is not so, but it is in substance an amendment to prevent "a variance between a matter in writing produced in evidence and the recital or setting forth thereof upon the record;" for, when the plaintiffs allege that they left a copy of the writ of *subpoena* with the defendant, they do by that word "copy" virtually embody

and set forth upon the record the whole writ of *subpoena* represented compendiously by that same word: and, inasmuch as the production, at the trial, of the written paper actually left with the defendant, varied from the *subpoena* itself in the particulars above referred to, it seems to us that the alteration directed to be made was an alteration which prevented the variance between the evidence and the record.

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Suppose the declaration, instead of alleging that the plaintiffs had left a copy of the writ of *subpoena* with the defendant, had alleged that he had left with him "the following written paper," &c., setting out the *subpoena* according to the tenor; there can be no doubt but that the case would then have fallen directly within the act; and that, upon the production of the paper actually left with the defendant, the statute would have authorized an amendment by striking out those parts in the declaration that were not found in the paper itself. The amendment which was directed appears to produce the same effect, though in a more compendious manner. Looking to the object of this act, which was, according to its title, to prevent a failure of justice by reason of variances between records and writings produced in evidence in support thereof, we think it should receive a construction as liberal as the words will admit; and that the amendment now under consideration falls within the fair interpretation of the words of the act.

The second objection urged by the defendant was, that, if the plaintiffs had originally made this allegation in the declaration, he might have demurred to the declaration. Now, without determining the question whether such demurrer would have been sustainable or not, we think that, as it does not appear by the evidence that the defendant took any such objection at the time the amendment was directed, he cannot avail himself of it in this stage of the proceedings; for, if he had in the first instance made

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that his ground of objection, it is by no means improbable that the Lord Chief Justice would have directed the plaintiffs to set out at length on the record the written paper which they left with the defendant; and, by so doing, though the cause could not but proceed as the act directs, the defendant might have taken the objection afterwards, if such objection is available, in arrest of judgment; or, he might have refused to make the alteration, and thereby compelled the plaintiffs to be nonsuited; or, at all events, such terms might have been imposed on the plaintiffs as would have met the justice of the case.

On the whole, we think we should very much abridge the benefit of a most useful act if we were to hold the present amendment to be unauthorized by it.

Rule discharged.

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DOE v. HARVEY.

In trespass for *mesne* profits, it was proved that the defendant held the premises under a written agreement, which was not produced:—*Held*, that parol evidence was not admissible to shew under whom the defendant held.

THIS was an action of trespass for *mesne* profits. The cause was tried before Mr. Justice *Alderson*, at the last Assizes for the county of *Somerset*. The plaintiff proved the occupation of the premises in question by the defendant from *May*, 1829, to *May*, 1830. He then offered in evidence a judgment obtained in *Hilary* Term, 1823, against one *Simon Payne* and his wife, in an action of ejectment for the recovery of these and other premises (a); and, to prove the value of the premises occupied by the present defendant, a son of *Simon Payne* was called. He stated that he had let the defendant into possession under a written agreement. This agreement not being produced

(a) See *Doe v. Whitcombe*, ante, p. 107.

(being without a stamp), it was contended, on the part of the defendant, that parol evidence could not be given, either as to the landlord under whom he held, or as to the terms of the holding: and also that, inasmuch as there was no evidence to shew that the defendant held in any manner under *Payne*, the record of the judgment in ejectment against him was not evidence against the defendant, he being no party or privy thereto.

The learned Judge, acceding to this opinion, directed a nonsuit, with liberty to the plaintiff to move to set it aside and enter a verdict for 10*l.*, the admitted value of the premises.

Mr. Serjeant *Wilde*, accordingly, in the last term, obtained a rule *nisi*.

Mr. Serjeant *Stephen* shewed cause.—There was no evidence of privity between the defendant and *Payne*, therefore the judgment in the action against the latter could not be given in evidence here. The agreement as to the tenancy being shewn to be in writing, parol evidence could not be given of its contents. The nonsuit, therefore, was right.

Mr. Serjeant *Wilde*, in support of the rule.—The only fact wanting to establish the plaintiff's claim, and to let in evidence of the judgment in the ejectment against *Payne*, was the simple fact of the tenancy under *Payne*, and that might be proved without reference to any stipulations contained in the written agreement. The agreement itself was immaterial to the question in issue. The amount of rent agreed to be paid is no measure of the damages in an action of this sort. In *The King v. The Inhabitants of The Holy Trinity and St. Margaret's, Hull* (a), the question

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(a) 1 Man. & Ryl. 444; S. C. 7 Barn. & Cress. 611—cited in *Stro-*

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was, whether or not a pauper was entitled to a settlement in respect of the occupation of a tenement of the yearly value of 10*l*. In order to prove the right of settlement, the counsel for the appellants were proceeding to shew that the pauper was in the occupation of a tenement of that value, and had paid rent for it, when the respondents' counsel interposed, and asked the pauper whether the contract under which he held the tenement was not in writing; and, upon his answering in the affirmative, it was objected that no parol evidence could be received upon the subject, but that the document itself must be produced, or the loss of it proved. The counsel for the appellants submitted, in reply, that they were not examining as to the contents of the document, which were immaterial to the issue, as, all that they proposed to prove was, the fact of the occupation of the tenement and the amount of the rent; which they contended they had a right to do, by the cross-examination of the pauper, without any reference to the written agreement. The Court of Quarter Sessions thought that the agreement ought to have been produced, or its absence accounted for, and that, neither having been done, its contents could not be proved by parol. The evidence was consequently rejected. The case was afterwards brought before the Court of *King's Bench*. Mr. Justice Bayley, in delivering the judgment of the Court, said (a): "The contents of this written agreement undoubtedly could not be proved by parol; and therefore it was properly held, in the cases which have been cited (b), that, where such a written agreement was in existence, the terms of the tenancy, or the amount of the rent, could be proved only by the production of the agreement itself. But

ther v. Barr, by Mr. Justice Park and Mr. Justice Gaslee. See 2 Moore & Payne, 207.

(a) 1 Man. & Ryl. 448.

(b) The King v. The Inhabitants of Castle Morton, 3 Barn. & Ald. 588, and the cases there cited.

the rule of law does not go so far as to prevent the admission of parol evidence of the fact that the relation of landlord and tenant existed between particular parties, at a particular time, in a particular parish. I think, decidedly, that proof by parol of the fact of the pauper's having been tenant was receivable."

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court:—

This was an action of trespass for the *mesne* profits. Upon the trial, it was proved that *Harvey*, the defendant, had occupied the premises in question from May, 1829, to May, 1830. The plaintiff, in order to prove his right to the possession of the premises during that period, offered in evidence a judgment in an action of ejectment brought for the same premises by the present plaintiff against one *Payne*. It was objected that this record was not admissible in evidence against the present defendant, he not being the defendant in the original cause, nor shewn to claim through or under him. The only evidence that was given as to the origin or nature of *Harvey's* occupation was, that one *Henry Payne*, the son of the defendant in the ejectment, had put him into possession. But, as it appeared from the same witness that he had been put into possession under a written agreement, which agreement was not produced, the parol evidence of *Henry Payne*, as to the landlord under whom he held, or the terms under which he was let into possession, was deemed insufficient for that purpose. The learned Judge who tried the cause, under these circumstances, held the record of the judgment in ejectment to be inadmissible in evidence in this cause; and the plaintiff was thereupon nonsuited, with liberty to move to set aside the nonsuit, and enter a verdict for the plaintiff.

After hearing the arguments against and in support of

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this motion, we are of opinion that the direction of the Judge upon both the points so made at the trial was right.

As to the first point—if nothing had been in issue but the single fact whether *Harvey* held or occupied the land, such fact might undoubtedly be proved by the payment of rent, declarations of the tenant, or other parol evidence sufficient to establish it, notwithstanding it appeared that he held under an agreement in writing. Authorities to this effect were cited in argument at the bar. But here, the question was, not merely whether *Harvey* held the premises, but whether he held them as tenant to *Payne*; and of this fact there was no other evidence admissible than the written agreement which was not produced.

The second point is simply this—whether, in an action of trespass for the *mesne* profits, a recovery in ejectment against a former tenant in possession is producible in evidence against a person who is afterwards found in possession, without proving that he came in under the defendant in ejectment, so as to make him a privy to the judgment in ejectment. We are all of opinion that it is not. A recovery in ejectment is conclusive evidence both of the plaintiff's right to the possession, and that the defendant is a trespasser, in an action for the *mesne* profits brought against the person who was defendant in the original action of ejectment. *Aslin v. Parkin* (a). According to the resolution of the Judges—"the tenant is concluded by the judgment, and cannot controvert the title." But no reason has been urged, nor any authority cited at the bar, to shew that this judgment is to be considered as differing from judgments in other personal actions; and the general rule of law is, that judgments bind only parties and privies, but, as to strangers, are considered as *res inter alios acta*, and are not producible in evidence against them. In the

(a) 2 Burr. 668.

case of *Denn v. White et ux.* (a), it was held by the Court, that, in an action of trespass for the *mesne* profits against husband and wife, a judgment in ejectment against the wife could not be given in evidence against the husband, because he was no party to that suit: and, again, in *Hunter v. Britts* (b), it was held by Lord *Ellenborough*, in an action of trespass for the *mesne* profits brought against the landlord of the premises, who had been in the receipt of the rents and profits from the time of the demise till the writ of possession was executed, that a judgment in ejectment against the casual ejectors was not admissible in evidence against him, without proof that the tenant upon whom the ejectment was served had given him notice of it. And this appears to have been on the ground that he was not privy to the judgment.

The only proof in this action that the defendant is a trespasser, or that the plaintiff has a right to the possession, is, by the production of the judgment against *Payne*. But, as the defendant is a stranger to *Payne* upon the evidence before the Court, no admission made by him, and no judgment obtained against him, ought to affect *Harvey* until he is shewn to be privy in estate with *Payne*. We therefore think the rule should be discharged.

Rule discharged (c).

(a) 7 Term Rep. 112.

(b) 3 Camp. 456.

(c) In replevin, the issue being whether the plaintiff held certain closes at a fixed rent specified in the avowry, it was held that unstamped receipts, tending to shew

that the plaintiff had previously paid for the same premises the like rent so specified, were inadmissible to support the issue. *Hawkins v. Warre*, 5 Dow. & Ry. 512.

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In replevin the defendant avowed for rent due and in arrear at *Martinmas*, "to wit, the 23rd November:"—

Held, that *Martinmas* must be taken to mean *New Martinmas*, and that the subsequent words, "to wit, the 23rd November," being surplusage, could not be taken to explain that *Old Martinmas* was intended.

SMITH v. WALTON and Another.

THIS was an action of replevin for taking the plaintiff's goods, &c. The defendants avowed and made cognizance, that the plaintiff occupied the house in which &c. for a year and a half next before and ending at *Martinmas*, 1830, "*to wit, on the 23rd November,*" 1830, as tenant thereof to the defendant *Walton*, under and by virtue of a certain demise thereof to him made at and under a certain yearly rent, to wit, the yearly rent of 3*l.* 10*s.*, payable half-yearly, that is to say at *Whitsuntide* and *Martinmas* in every year; and because 5*l.* 6*s.* of the rent aforesaid, for the space of one year and a half ending, as aforesaid, at *Martinmas*, "to wit, on the 23rd of November," 1830, and from thence hitherto was and is due and payable and in arrear, the defendants avowed, &c., &c.

Plea, *non tenuit modo ac formd*, whereupon issue was joined.

At the trial, before Mr. Justice *James Parke*, at the last Summer Assizes at *York*, it appeared that the plaintiff held the premises in question under a parol agreement; and there was conflicting evidence as to whether the rent was payable at *Martinmas* new style or at *Old Martinmas*. This question being left to the jury, they found that the rent was payable at *Old Martinmas*. The learned Judge, reserving the point, directed the verdict to be entered for the plaintiff.

Mr. Serjeant *Wilde*, in the last term, in pursuance of leave reserved at the trial, on the part of the defendants, obtained a rule *nisi* that this verdict might be set aside, and a verdict entered for the defendants.

Mr. Serjeant *Jones* shewed cause.—Where the contract of letting is by parol, evidence is admissible to explain it.

Thus, in *Doe d. Hall v. Benson* (a), where rent was to be payable by a parol demise from the *Lady-day* following, evidence of the custom of the country was held to be admissible to shew, that, by "*Lady-day*," *Old Lady-day* was intended.

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[Mr. Justice *Alderson* referred to *Denn d. Peters v. Hopkinson* (b), where it was held, that, when a written agreement is not sealed, parol evidence is admissible to shew, that, by the term "*Lady-day*" contained therein, the parties meant *Old Lady-day*.]

In the present case it was left to the jury to say whether the rent was payable at *Old* or at *New Martinmas*; and their finding that it was payable at *Old Martinmas*, a fact at variance with the defendants' avowry and cognizance, disposes of the case; for, although extrinsic evidence may be given to explain a parol contract, yet such evidence cannot be admitted to explain the record. The allegation upon the record here is, that the rent was payable at *Whitsuntide* and *Martinmas*; that *prima facie* means *New Martinmas*; and the words which follow under a *videlicet* "to on the wit, 28rd *November*," cannot aid the construction, they being mere surplusage. In *Doe d. Spicer v. Lea* (c) it was held, that, since the existence of the new style sanctioned by act of parliament, a lease by *deed*, to hold from the feast of *St. Michael*, must be taken to mean *New Michaelmas*; and that extrinsic evidence is not admissible to shew that it means a holding from *Old Michaelmas*.

Mr. Serjeant *Wilde*, in support of his rule.—If the avowry had stated the rent to be due at *Martinmas* generally, without any thing to shew to which *Martinmas* it referred, it would undoubtedly have been open to the objection; but all ambiguity and doubt are removed by the explanatory words which follow, "to wit, on the 28rd *November*," clearly shewing that *Old Martinmas* was intended.

(a) 4 Barn. & Ald. 588. (b) 3 Dow. & Ryl. 507. (c) 11 East, 312.

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The Court took time to consider, and to look into the statute (a), observing that they would gladly get over the objection, if possible.

Lord Chief Justice TINDAL now delivered the judgment of the Court:—

The question in this case arises upon an avowry and cognizance by the defendants, in which they allege that the plaintiff, for one year and a half next before and ending at *Martinmas*, 1830, to wit, on the 23rd day of *November*, 1830, held and enjoyed the place in which &c. as tenant thereof to the avowant, by virtue of a certain demise thereof to the plaintiff made, at and under the yearly rent of *£l. 10s.*, payable half-yearly, that is to say, at *Whitsuntide* and *Martinmas* in every year; and, because the sum of *£l. 5s.* of the rent aforesaid, for the space of one year and a half ending as aforesaid at *Martinmas*, to wit, on the 23rd day of *November*, 1830, and from thence, &c., was due and payable, therefore the defendants avow and acknowledge the distress made. To this avowry and cognizance there was a plea in bar, that the plaintiff did not hold *modo ac formá*; and, upon the trial of an issue joined on this plea, the jury found that the rent was payable at *Old Martinmas*, and a verdict was entered for the plaintiff.

A motion has been made to set aside this verdict, and to enter a verdict for the defendants, by leave of the learned Judge who tried the cause; and, after hearing the argument against and in support of the rule, the majority of the Judges who heard the argument think the present verdict ought to stand.

The case of *Doe d. Spicer v. Lea* appears to us to be decisive upon the present point. There, it was held, that, since the existence of the new style sanctioned by act of Parliament, a lease by *deed*, to hold from the feast of St. *Michael*, must be taken to mean *New Michaelmas*; and that extrinsic evidence is not admissible to shew that it

(a) 24 Geo. 2, c. 23.

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meant a holding from *Old Michaelmas*: and we think, where there is an allegation upon the record that the tenant holds at a rent payable half-yearly, that is to say, at *Whitsuntide* and *Martinmas* in every year, the same rule which governs the construction of a deed, must govern the construction of a plea; and that it can only be understood to mean *New Martinmas*, there being only one day set down as *Martinmas* in the calendar which forms part of the statute for the alteration of the style. It is true, that, in another part of the avowry, distinct from the allegation of the terms of the tenancy, the defendants state the year's rent for which the distress was taken to be for a year ending at *Martinmas*, "to wit, on the 23rd November;" but we think ourselves bound to take notice that *Martinmas* falls on the 11th of *November* in every year, by the enactment of the statute above referred to; and that it cannot fall on any other day; and, consequently, that all which follows under the *videlicet*, which is inconsistent with and contrary to such enactment, must be rejected.

Evidence, no doubt, is admissible in the case of a *parol* taking at *Martinmas* generally, to shew whether the day of taking was intended to be calculated according to the new or old style; indeed, such evidence was admitted in this very case for the purpose of shewing that the rent was payable at *Old Martinmas*, which the Jury found to be so. But no case can be found, in which, where a party pleads upon the record that the taking was from *Martinmas*, he has been allowed to shew that he meant by that pleading *Martinmas* according to the old style.

My Brother *Gaselee* thinks the words under the *videlicet* amount, in effect, to a distinct averment that the word *Martinmas* in the pleading, so explained, means the feast of *Old Martinmas*, which falls upon the 23rd *November*; and that the allegation in the first part of the avowry, that the holding was for a period ending at *Martinmas*, viz. "the 23rd of *November*," and again, a similar allegation in the

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letter part of the pleadings, shew that the word *Martinmas* mentioned in the reservation of rent must be intended to apply to the same day, that is, *Old Martinmas*. He agrees with the rest of the Court in the opinion that no extrinsic evidence ought to be received to explain the record.

Rule discharged.

Tuesday,
Jan. 31st.

ABRAHAM V. NORTON.

The Court refused to grant an order for the examination before the Prothonotary (pursuant to the statute 1 W. 4, c. 22) of a female witness, upon an affidavit that the cause was not down for trial at the Sittings after Hilary Term, and that the witness was expected to be confined in the month of February or March, and therefore would be unable to attend.

A RULE nisi was, on a former day in this term, obtained by Mr. Serjeant *Wilde*, on the part of the plaintiff, for the examination of a witness before the Prothonotary, under the provisions of the statute 1 Will. 4, c. 22 (a). The af-

firmavit that the cause was not down for trial at the Sittings after Hilary Term, and that the witness was expected to be confined in the month of February or March, and therefore would be unable to attend.

Quære whether pregnancy be a permanent sickness or infirmity, in the contemplation of the statute.

(a) By the 1st section of which, after reciting that great difficulties and delays are often experienced, and sometimes a failure of justice takes place, in actions depending in Courts of law, by reason of the want of a competent power and authority in the said Courts to order and enforce the examination of witnesses, when the same may be required, before the trial of a cause; that, by the 13 Geo. 3, c. 63, certain powers are given and provisions made for the examination of witnesses in *India* in the cases therein mentioned; and that it was expedient to extend such powers and provi-

sions—it is enacted—"That all and every the powers, authorities, provisions, and matters contained in the said recited act, relating to the examination of witnesses in *India*, shall be, and the same are hereby extended to all colonies, islands, plantations, and places under the dominion of his Majesty in foreign parts, and to the Judges in the several Courts therein, and to all actions depending in any of his Majesty's Courts of law at *Westminster*, in what place or county soever the cause of action may have arisen, and whether the same may have arisen within the jurisdiction of the Court to the

affidavit of the plaintiff's attorney, upon which the motion was founded, stated, that the cause was ready for trial at the sittings after this term; and that he had been informed by the husband of the witness in question (who was a material and necessary witness for the plaintiff), that she was pregnant, and likely to be confined in the month of *February or March*.

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Mr. Serjeant *Bompas* now shewed cause.—The affidavit is not sufficient. It does not appear with any degree of certainty when the witness is likely to be confined. Besides, this is not a case within the contemplation of the statute. Section 10 enacts, “That no examination or deposition to be taken by virtue of this act shall be read in evidence at any trial without the consent of the party against whom the same may be offered, unless it shall appear to the satisfaction of the Judge that the examinant or deponent is beyond the jurisdiction of the Court, or dead, or unable from *permanent* sickness, or other *permanent* infirmity, to attend the trial; in all or any of which cases, the examinations and depositions, certified under the hand of the Commissioners, Master, Prothonotary, or other person taking the same, shall and may, without proof of the signature to such certificate, be received and read in evidence, saving all just exceptions.” Here, there is no reasonable ground for the Court to conclude that the infirmity of the witness in question will be permanent. The plaintiff may postpone the trial.

Judges whereof the writ or commission may be directed, or elsewhere, when it shall appear that the examination of witnesses under a writ or commission issued in pursuance of the authority hereby given will be necessary or conducive to the administration of justice in the matter wherein

such writ shall be applied for.”

And by section 4 the Courts at *Westminster* are empowered to order the examination of witnesses within their jurisdiction by an officer of the Court; or to order a commission for that purpose out of their jurisdiction.

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Mr. Serjeant *Wilde*, in support of the rule.—The statute in question was passed for the advancement of justice; and this is a proper case for the exercise of the discretion which it gives to the Court. The day of trial is uncertain, and the affidavit shews, that, if it take place in the month of *February* or *March*, the witness will be unable to attend. No injustice will be done to the defendant, nor will any unfair advantage be obtained by the plaintiff, if this rule be made absolute.

Lord Chief Justice TINDAL.—It may be doubted whether the infirmity of this witness is of a nature that is within the contemplation of the statute; it is only temporary. It is not however necessary at present to lay down any general rule upon the subject: for, the affidavit in support of this motion is not sufficiently explicit. It should at least be made appear to the Court, by the affidavits of persons of competent skill, that the confinement of the party is likely to take place before the time of the trial, or so near thereto as to render the attendance of the witness a matter of difficulty and danger.

Mr. Justice PARK.—I agree with my Lord Chief Justice, that the affidavit should have been more precise; and I also abstain from giving any opinion upon the construction of the act.

Mr. Justice GABELEE concurred.

Mr. Justice ALDERSON.—It would be dangerous to lay down any general rule in this case; it might be misapplied. These examinations should only be granted in cases of imperative necessity. There is a great difference between an examination of a witness taken in Court, and an examination upon interrogatories, or before the Master or Prothonotary.

Rule discharged.

In the Exchequer Chamber.

HILARY TERM, 2 WILL. IV.

GIBB v. MATHER and Others.

[In Error.]

1832.

Monday,
Jan. 30th.

THIS was an action of *assumpsit* against the plaintiff in error (the defendant below) as drawer of a bill of exchange.

The first count of the declaration stated that the defendant below, on the 27th *September*, 1828, at *Liverpool*, that is to say, at *Preston*, in the county of *Lancaster*, according to the usage and custom of merchants, made and drew a certain bill of exchange in writing, and then and there directed the said bill of exchange to Messrs. *Chapman & Fairclough*, and then and there required the said Messrs. *Chapman & Fairclough*, four months after the date thereof, to pay to the order of the defendant below, in *London*, 175*l.* 10*s.*, value received in timber; which said bill the said Messrs. *Chapman & Fairclough* afterwards, to wit, on &c., at &c., accepted according to the said usage and custom of merchants, payable at Messrs. *Jones, Lloyd, & Co's.*, bankers, *London*: and the said defendant below, to whose order the said sum of money in the said bill of exchange specified was to be paid, afterwards, to wit, on &c., at &c., by one *John Kempster*, then and there being the agent of the defendant below in that behalf, indorsed the said bill

The drawer of a bill of exchange required the drawee to pay the amount to his order "in *London*;" the latter accepted it, "payable at Messrs. *J., L., & Co's.*, *London*:"—Held, that, to charge the drawer, on non-payment by the acceptor, a presentment at Messrs. *J., L., & Co's.* was necessary, although by the statute 1 & 2 *Geo. 4.* c. 78, such acceptance is general.

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of exchange according to the said usage and custom of merchants, and then and there delivered the said bill of exchange so indorsed to one *John M^r Killop*; and the said *John M^r Killop* afterwards, to wit, on &c., at &c., duly indorsed the said bill of exchange, and then and there delivered the same, so indorsed as aforesaid, to the plaintiffs below. The plaintiffs below then averred, that, afterwards, to wit, on &c., at *Liverpool*, in the county of *Lancaster*, the said bill was shewn and presented to the said Messrs. *Chapman & Fairclough*, upon whom the said bill was drawn, for payment thereof; and the said Messrs. *Chapman & Fairclough* were then and there required to pay the same; but that the said Messrs. *Chapman & Fairclough* did not, when the said bill was so shewn and presented to them for payment as aforesaid, or at any other time, pay the same, or any part thereof, but, on the contrary thereof, then and there wholly refused so to do, and therein wholly failed and made default: of all which said several premises the defendant below afterwards, to wit, on &c., at &c., had notice; by reason whereof, and by force of the said usage and custom of merchants, the defendant below then and there became liable to pay to the plaintiffs below the said sum of money in the said bill mentioned, when he, the defendant below, should be thereunto afterwards requested; and, being so liable, the defendant below, in consideration thereof, afterwards, to wit, on &c., at &c., undertook and then and there faithfully promised the plaintiffs below to pay them the said sum of money in the said bill mentioned, when he, the defendant below, should be thereunto afterwards requested.

The second count alleged that Messrs. *Chapman & Fairclough* were, at *Liverpool*, required to pay the bill, according to the tenor and effect thereof, and of the said indorsements so made thereon as aforesaid.

The third count, that the bill was, at *Liverpool*, in due

manner shown and presented to Messrs. *Chapman & Fairclough*.

The cause was tried before Mr. Justice *James Parke*, at the last Assizes at *Lancaster*, when the following facts appeared in evidence, or were admitted by the defendant's counsel:—

The plaintiffs below were partners. The bill in question was in the following form:—

“£175. 10s. “ *Liverpool*, 27th Sept., 1828.

“Four months after date, pay to the order of myself in *London*, one hundred and seventy-five pounds, ten shillings, value received in timber.

“ *Duncan Gibb*.”

“The Messrs. *Chapman & Fairclough*, *Liverpool*.

“Payable in *London*.”

The acceptance was as follows:—

“Accepted at Messrs. *Jones, Lloyd, & Co's.*, Bankers, *London*.

“ *Chapman & Fairclough*.”

The indorsement—“*P. pro. Duncan Gibb*.

“ *John Kempster*.”

The handwritings of the several parties to the bill were proved. The defendant below himself presented the bill for acceptance to *Thomas Fairclough*, one of the partners of the firm of *Chapman & Fairclough*, and himself received back the bill from the said *Thomas Fairclough* so accepted as above stated. *John Kempster* was duly authorized by the defendant below to indorse the bill on his behalf. On the 30th January, 1829, the day the bill became due, it was presented to the acceptors at *Liverpool*, and payment refused. On the same day, notice of the presentment and non-payment was given to the defendant below, the drawer.

The learned Judge told the jury that the facts above

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mentioned were sufficient to entitle the plaintiffs below to a verdict. The jury accordingly found for them.

A bill of exceptions was then tendered, and sealed, and was argued on a former day in this term.

Mr. *F. Kelly*, for the defendant below.—The question is whether, where, in the body of a bill of exchange, the drawee is required to pay the amount in *London*, and he accepts it payable in *London*, it be necessary, in order to charge the drawer, on non-payment by the acceptor, to prove a presentment to the acceptor at the place where the bill is made payable in *London*. That such presentment in *London* is necessary, is the basis on which the defendant below rests his case. Before the late statute, 1 & 2 Geo. 4, c. 78, a bill drawn in this form must, whether accepted or not, have been presented in *London*; and, whatever effect that statute may have upon the acceptance, it does not apply to the drawer of the bill.

Before the case of *Rowe v. Young* (a), there was a difference of opinion in the Courts, as to the effect of an acceptance making the bill payable at a particular place. The Court of *Common Pleas*, in a variety of cases, had held it necessary, even to charge the acceptor, that there should be a presentment at the place specified. On the other hand, the Court of *King's Bench* held such acceptance to be general, and the acceptor liable every where. In the case of *Rowe v. Young* (b), the *House of Lords*, upon the opinions of the Lord Chancellor (Lord *Eldon*), Lord *Redesdale*, and eleven of the Judges, supported the decisions of the Court of *Common Pleas*, holding, that, in order to charge the acceptor upon a bill accepted payable at a particular place, presentment must be made at that place. No difference, however, had ever prevailed as to a bill in the body of it made payable at a particular place;

(a) 2 Brod. & Bing. 165. (b) Where all these cases will be found.

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it had always been uniformly held, that, where the drawer required the drawee to pay at a given place, the presentment must be made there. That principle is clearly laid down in *Saunderson v. Bowes* (a), which was the case of an action against the maker, and also in *Roche v. Campbell* (b), in an action against the indorseé, of a promissory note. In the former of these cases Lord *Ellenborough* said (c): "This case is materially different from that of *Fenton v. Goundry* (d), lately decided by this Court; which was the case of a bill drawn generally, but accepted at a particular place; which special acceptance we considered merely as importing the intention of the party, that he would be found when the bill became due at that place as his house of business, where he should be prepared to pay it. There, the acceptance payable at the place was no part of the original conformation of the bill itself; but here the words restrictive of payment at the place named are incorporated in the original form of the instrument, which alone creates the contract and duty of the party. Under such circumstances, a demand there by the holder is a condition precedent, in order to give himself a title to receive the money."

The case of *Rowe v. Young*, in the year 1820, having settled the law upon this subject, the statute 1 & 2 Geo. 4, c. 78, was passed. As a difference had existed in the Courts as to the effect of what the Court of *Common Pleas* had considered a special acceptance, it was thought desirable to lay down a rule to regulate and ascertain the liability of acceptors. The act is intitled "An act to regulate *acceptances* of bills of exchange." The preamble recites, that, "according to law, as had been adjudged, where a bill was accepted payable at a banker's, the *acceptance* thereof was not a general but a qualified *acceptance*; that a practice had very generally prevailed

(a) 14 East, 500.

(c) 14 East, 507.

(b) 3 Camp. 248.

(d) 13 East, 459.

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among merchants and traders so to *accept* bills, and the same had, among such persons, been very generally considered as bills generally *accepted*, and *accepted* without qualification; and that many persons had been and might be much prejudiced and misled by such practice and understanding, and persons *accepting* bills might relieve themselves from all inconvenience, by giving such notice as thereafter mentioned of their intention to make only a qualified *acceptance* thereof." The 1st section then enacts, "That, from and after the 1st *August*, 1831, if any person shall accept a bill payable at the house of a banker, or other place, without further expression in his acceptance, such acceptance shall be deemed, to all intents and purposes, a general acceptance of such bill; but, if the acceptor shall in his acceptance express that he accepts the bill payable at a banker's house or other place *only, and not otherwise or elsewhere*, such acceptance shall be deemed to be to all intents and purposes a qualified acceptance, and the acceptor shall not be liable to pay the said bill, except in default of payment when such payment shall have been duly demanded at such banker's house, or other place." Throughout the whole statute, no reference is made to *drawers*, but only to *acceptors*. It would operate a serious inconvenience to merchants, if they could only make a general acceptance of a bill. Upon this subject, Lord *Rodesdale* says, in *Rowe v. Young* (a): "This bill is accepted by a man resident at *Torpoint*, payable in *London*, at a certain banking-house. What is asserted to be the effect of this acceptance? That he engages to have money both at *Sir John Perring & Co.'s* and at his own residence at *Torpoint*. If he accepted simply, he would engage only to have the money at *Torpoint*; but it is said, that, because he accepts with this addition, he engages to have the money at both places. This is making him engage for two

(a) 2 Brod. & Bing. 178.

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things instead of one; and it does seem to me that it must have been his intention to engage for only one, namely, a payment in *London*; for, it is perfectly clear that payment at *Terpoint* and payment in *London* are two different things: and if he be liable to be called upon at both places, his liability is rendered more inconvenient." That was one of the inconveniences which the act was intended to remedy. The act gives power to acceptors to restrict their liability to payment at a particular place; but it gives no such power to drawers; therefore, unless the law with regard to drawers remains the same as it was before the passing of the act, the drawer of a bill is without the means of protecting himself from the inconvenience above mentioned. The liability of the drawer arises upon failure of the acceptor to pay according to the tenor and effect of the bill. Suppose in this case there had been no acceptance—the extent of the drawer's liability would have been, to pay the bill in default of payment by the drawee on presentment at the place where the latter was required to pay it. In *Rowe v. Young*, Lord Chief Justice *Abbott* says (a): "In estimation of law, all bills are to be considered as drawn for value, if not actually in the hands of the drawee at the time of drawing (which seems to have been usually the case in the infancy of those instruments), at least, intended by the drawer and expected by the drawee to be placed in the hands of the latter before the maturity of the bill. And a person who draws a bill under such circumstances may be permitted to elect for himself the time and place of payment; because, if the drawee should refuse to pay according to such election, he would be able to sue him for the sum which constitutes the value of the bill, either immediately, if the value has been previously received, or so soon as it shall be received, according to the intention upon which the bill is drawn." The acceptor may accept for a smaller

(a) 2 Brod. & Bing. 275.

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sum than the bill is drawn for: but it has never been supposed that he could extend the liability of the drawer, which would be the case if the holder had the option either to present it at the place at which the drawer has made it specially payable, or not, because the acceptor has chosen to accept it in a general form. "The effect," says Mr. Justice Bayley, in *Rome v. Young* (a), "of such an acceptance is this, that, to entitle the holder to sue the drawer or indorser, it casts an obligation upon him to present the bill at Sir John Perring & Co's for payment; but that, as against the acceptor himself, the holder is not bound so to present it; that he is under no obligation to aver any such presentment in his declaration; and that the only consequence of his neglect to present is this, that the acceptor may set up any loss he has sustained thereby as matter of defence."

In the present case, the bill was accepted before it passed out of the hands of the drawer; and it may therefore be said that the drawer has, by negotiating it with this general acceptance, acquiesced in the extension of his liability. But that fact can make no difference; for, the liability of the drawer arises on the face of the draft, and cannot be extended by the acceptance. Upon all the authorities, therefore, it is perfectly clear, that a presentment of the bill in question at the house of Messrs. Jones, Lloyd, & Co., ought to be shewn as a condition precedent to the right of the holders to charge the drawer. This was so before the passing of the statute; and, as far as the drawer is concerned, the statute has not altered the law.

Mr. Roscoe, *contrà*.—The statute 1 & 2 Geo. 4, c. 78, declares an acceptance similar to that which appears in the present case to be a *general* acceptance, and to dispense with the necessity of a presentment or averment of presentment at the place where the bill is expressed to be payable.

(a) 2 Brod. & Bing. 231.

De Bergareche v. Pillin (a), *Salby v. Eden (b)*. In the latter case, it was held, that, if a bill of exchange be drawn payable at a particular place, and the drawee accept it, without stating that he accepts it payable there *and not elsewhere*, according to the terms of the statute, the acceptance must be taken as a general acceptance, and no presentment for payment at that place is necessary. That case was confirmed by *Fagle v. Bird (c)*. The liability of the drawer arises on default of the acceptor, and is co-extensive with the acceptor's liability. It was therefore sufficient in this case to shew a proper presentment to the acceptors, and non-payment by them. The statute makes no distinction between the drawer and the acceptor. The special acceptance is not for the benefit of the drawer, but for that of the acceptor. It is clearly competent to the drawee to restrict the place of payment by his acceptance; why may he not extend it? No inconvenience could in this case arise to the drawer; for, he was cognizant of the alteration made by the acceptors in the place of payment, by the general acceptance, the bill having been accepted whilst in his hands. If the drawees had thought fit to make the bill payable in London only, they would have pursued the form of acceptance given by the act: they not having done so, the acceptance, as against all parties to the bill, is general.

Mr. F. Kelly, in reply.—The cases cited are all actions against the acceptor. Bills may be accepted in a variety of ways so as to diminish the liability of the acceptor, and also that of the drawer; but in no case can the acceptor enlarge the responsibility of the drawer. The effect of the acceptance in this case is, to charge the drawees as upon a general acceptance, leaving the drawer to his special liability. In an action against the drawer, the accep-

(a) 11 J. B. Moore, 350; S. C. 3 Bing. 611.
 3 Bing. 476. (c) 6 Barn. & Cress. 531.
 (b) 11 J. B. Moore, 511; S. C.

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tanica becomes wholly immaterial; his liability is according to the tenor of the bill itself: in declaring against him, it is not necessary to aver acceptance.

Cur. ade. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court:—

This was an action by the indorsees against the drawer of a bill of exchange after non-payment by the acceptors. Upon the trial of the cause, it appeared, upon production of the bill, that the drawn, in the body of the bill, required the drawees to pay to the order of himself, "in London," the sum mentioned therein; that the bill was addressed to Messrs. *Chapman & Fairclough, Liverpool*, with the additional words, "payable in London;" and that it was by them accepted "at Messrs. *Jones, Lloyd, & Co's*, bankers, London." It appeared further, that, upon the day the bill became due, it was presented for payment to the acceptors at *Liverpool*, who refused payment; and that due notice of such refusal was given to the defendant. The learned Judge who tried the cause directed the jury that the evidence above stated was sufficient to entitle the plaintiffs to recover, and the jury found their verdict for the plaintiffs below.

The propriety of this direction now comes before us upon a bill of exceptions tendered by the defendant below; and the question raised for our consideration is this—whether, in an action against the drawer of the bill, on the ground of non-payment by the acceptor, it is or is not necessary to prove a presentment for payment at the banking-house in *London*, where the same is made specially payable by the acceptance. We are all of opinion that such special presentment is necessary, in order to enable the holder to recover against the drawer of the bill.

Before the passing of the statute 1 & 2 Geo. 4, c. 78, it was a subject of considerable doubt in the Courts of law, whether, in the case of a bill drawn generally, but accepted

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payable specially at a particular place, an action could be maintained against the acceptor, without averring in the declaration, and proving at the trial, a presentment for payment at the place where the drawee had, by his acceptance, made the bill payable. Upon that point, the Court of *Common Pleas* had held a presentment of the bill at the place named in the acceptance to be necessary, on the ground that it was a qualified acceptance only; the Court of *King's Bench*, on the contrary, had held that it was unnecessary to make any such presentment, on the ground that the acceptance was a general acceptance, with a mere intimation of a place of payment; if the holder thought proper to apply there. The conflicting opinions of the two Courts upon that point were set at rest before the framing of the statute, by the judgment of the *House of Lords* in the case of *Rowe v. Yelling*, by which judgment the opinion held by the Court of *Common Pleas* was decided to be the law of the land. But the doubt which had been formed was confined to the case where the question arose between the holder and the acceptor. In cases between the indorsee and the drawer, upon a special acceptance by the drawee, no doubt appears to have existed but that a presentment at the place specially designated in the acceptance was necessary in order to make the drawer liable upon the dishonor of the bill by the acceptor. Still less did the doubt ever extend to cases where the drawer directed, by the body of the bill, that the money should be payable at a particular place: in such a case, all the Courts at *Westminster* agreed that the presentment must be made at the place specially designated in the bill itself. This had been decided in the Court of *King's Bench*, in the case of a banker's promissory note, which was made payable at a certain place named in the body of the note (a). The same doctrine was also laid down in the case of *Roche*

(a) See *Saunderson v. Bowes*, 14 East, 500. But see *Williams v. Waring*, 10 Barn. & Cress. 2; S. C. 5 Man. & Ryl. 9, where, by a memorandum at the foot of a promissory note, it was made pay-

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v. *Campbell*(a), where the action was brought by the indorsee of the note against the indorser. Now, no distinction as to this point can be taken between the drawer of a bill of exchange and the indorser of a promissory note. As to their liability to the holder, they stand precisely in the same situation. It is the acceptor of the bill and the maker of the note who are primarily liable to the holder: and the drawer of the bill, like the indorser of the note, does not become liable until there has been a due presentment made to the party liable in the first instance to pay the bill. The law, therefore, which applies to the indorser of the note, will also govern the case of the drawer of a bill. Such, then, being the state of the drawer's liability at the time the statute was passed, it must still remain the same, unless the statute has made an alteration therein. But it appears to us that the statute neither intended to alter, nor has it in any manner altered, the liability of drawers of bills of exchange, but that it is confined in its operation to the case of acceptors alone. The title of the act is—"An Act to regulate *acceptances* of bills of exchange." And—after reciting that it had been adjudged, that, where a bill is accepted payable at a banker's, the acceptance thereof is not a general but a qualified acceptance; but that a general practice and understanding had prevailed amongst merchants that such acceptance was a general acceptance—it proceeds to enact, that, after the passing of that act, such an acceptance shall be deemed and taken to be, to all intents and purposes, a general acceptance of such bill, unless the acceptance is restricted to payment at the particular place, by the words and in the manner directed in the act. The very reference in the statute to the adjudication by law imports that the legislature intended the statute to apply to those cases only in which

able at a particular place; and it was held, that this did not constitute a part of the contract, so as to make it necessary for the party

suing on the note to aver and prove a presentment there.

(a) 3 Camp. 247.

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doubts had previously existed, and which had been adjudged in law; not to cases like the present, which were free from doubt at the time of the passing of the act. Again, the enactment comprehends in terms the cases of acceptors, and acceptors only, and is silent altogether upon the subject of the liability of drawers and indorsers. It foresees the inconvenience which is cast upon acceptors by the enactment that an acceptance of a bill payable at a particular house shall thenceforth be considered as a general acceptance, and it gives the acceptor the power of protecting himself against such inconvenience by the use of restrictive words in his acceptance. But the inconvenience is as great to the drawer as to the acceptor. If the drawer has directed his money to be paid at a particular place, and, after an acceptance made payable at that place, the bill should be returned to him dishonoured, without a presentment at the house where it was made payable, it is as great a hardship upon him as the act had contemplated and provided for in the case of the acceptor. If, then, the statute had intended the enactment to apply to the case of the drawer, we cannot but think the same protection would have been given to the drawer which had been given in terms to the acceptor of the bill.

One argument advanced on the part of the defendant in error is, that the acceptor has varied his acceptance from the original terms in which the bill was drawn; and, as the drawer has been contented to take back the bill with such varied acceptance, it must now be considered as a general acceptance, under the operation of the late statute. But the answer to this argument seems to be, that the direction contained in the body of the bill is not altered or varied by the terms of the acceptance, any further than was necessary for the benefit of the drawer and of all subsequent parties. The drawer directs the drawee to pay the money in *London*; the drawee accepts, specifying the particular house in *London* at which he intends to

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pay the bill; without such specification, the acceptance might from its generality be useless; and the form of the bill implies that the drawer expected and intended the drawee to make it payable in *London*.

We therefore think, that, as no presentment was made at the house of the bankers in *London*, where the acceptor had undertaken to pay it, the liability of the drawer never arose, and, consequently, that the judgment which has been given for the plaintiff below must be—

Reversed (a).

(a) In *Mitchell and Another v. Baring and Others*, 10 Barn. & Cress. 4, a foreign bill of exchange was drawn on C, C., & Co., at *Liverpool*, payable to A. in *London*; the drawees having refused to accept, it was accepted by B. & Co. in *London*, for the honor of the payee, if regularly protested, and refused when due: it was held, in an action against the acceptors for honor, that, by the special form of the acceptance, a presentment for payment to the drawees in *Liverpool*, a refusal by him, and a protest there, were necessary, and therefore that the bill was properly presented for payment there on the day it became due.

This decision giving rise to some doubts, the statute 2 & 3 Will. 4, c. 98, was passed for the purpose of removing them. By that statute—after reciting that doubts had arisen as to the place in which it was requisite to protest for non-payment bills of exchange, which, on the presentment for acceptance to the drawee or drawees, should not have been accepted, such bills of exchange being made

payable at a place other than the place mentioned therein to be the residence of the drawee or drawees thereof, and that it was expedient to remove such doubts—it is enacted, “That, from and after the passing of this act, all bills of exchange wherein the drawer or drawers thereof shall have expressed that such bills of exchange are to be payable in any place other than the place by him or them therein mentioned to be the residence of the drawee or drawees thereof, and which shall not on the presentment for acceptance thereof be accepted, shall or may be, without further presentment to the drawee or drawees, protested for non-payment in the place in which such bills of exchange shall have been by the drawer or drawers expressed to be payable, unless the amount owing upon such bills of exchange shall have been paid to the holder or holders thereof on the day on which such bills of exchange would have become payable had the same been duly accepted.”

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of the Trustees of the late Duke of BRIDGEWATER.

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[In Error.]

Friday,
Nov. 25th.

THIS was an indictment for a nuisance. The first count of the indictment stated—That, after the passing of a certain act of parliament, passed in the second year of the reign of his late Majesty, King George the Third, to enable the most Noble Francis, Duke of Bridgewater, to make a navigable cut or canal from Longford Bridge, in the township of Stretford, in the county palatine of Lan-

An indictment against the proprietors of land adjoining a river and brook, charged the defendants with erecting mounds and embankments on their banks, whereby the waters of the river were wrongfully forced against

an aqueduct belonging to the prosecutors, the proprietors of a canal, to the injury thereof. The jury found by a special verdict, that the canal was raised by artificial embankments, and was carried across the river by means of an aqueduct of one arch; that, at a short distance from the river, towards the north, the canal was supported upon three arches, near to which were two culverts; that the brook flowed into the river a little above the aqueduct; that the embankments, called fenders, were made for the purpose of preventing the waters of the river and brook from overflowing the adjoining lands; that the fenders had been from time to time raised, as occasion required, by the defendants; that the natural fall of the lands adjoining the north banks of the river, after its junction with the brook, was towards the three arches under the canal; that, before the banks of the river and brook were raised, the water of the river was, in times of flood, frequently penned back by the brook, and, flowing over its north bank, inundated the low lands to the extent of many hundred acres, doing much mischief, and, passing through the three arches, fell again into the river; that the whole of the three arches were not at all times necessary, but that one small arch would be sufficient to pass all the drainage and other water except flood-water; that, by reason of the embankments on which the canal was raised, and of the want of sufficient outlets under the same, the flood-water had been penned up on the land higher up the river than the point of its junction with the brook, and had broken down the north bank of the river, and, after inundating the adjoining lands, flowed down to the three arches; that the improved drainage of the country higher up the river had occasioned a greater quantity of water to flow down the river to the aqueduct than used to flow down for several years immediately after the aqueduct was built, but that the aqueduct was still of sufficient capacity for the passage of the waters of the river at all times except in times of high floods; and that the raising of the fenders on the banks of the river and brook, had occasioned a much greater quantity of water, in times of high floods, to flow to and against the aqueduct than did or could flow to and against the same for several years immediately after the aqueduct was built, and had rendered the aqueduct insufficient for the passage of the waters of the river in times of high floods, and had thereby greatly endangered the canal; but that the fenders had not been raised more than was necessary to protect and prevent the said lands from being inundated. Judgment having been given for the Crown, in the Court of King's Bench, this Court awarded a *venire de novo*, on the ground that the special verdict did not state with sufficient certainty what was the real cause of the penning back of the water in time of flood, nor whether the raising the banks by the defendants had a legal and justifiable commencement, nor what was the rightful cause of the flood-water—holding that, in order to shew the defendants guilty of the offences charged, it ought to appear distinctly upon the special verdict, that the raising of the fenders was not an accustomed and rightful usage; that it was not sanctioned by antient usage, or by the ordinary right which every man has, *primæ facie*, to protect his own property, provided he can do it without injury to others; and that the course which the flood-water was stated to have taken was the antient and rightful course which it ought to take—and further, that it ought not to have been left in doubt whether the embankment and aqueduct had not wrongfully turned back more water upon the low lands of the defendants than was formerly collected in times of flood; or whether the banks of the river and brook had been raised without any necessity, and not in self defence against the consequences of the construction of the embankment and aqueduct.

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easter, to the river *Mersey*, at a place called the *Kemp Stones*, in the township of *Halton*, in the county of *Chester*, and within the times in the said act in that behalf limited, to wit, in the year of our Lord 1763, a cut or canal from *Longford Bridge* aforesaid, to the river *Mersey* aforesaid, was made in pursuance of the said act, and from thence until and at the time of the taking of that inquisition, had been continued and used, and still was continued and used, to wit, in the county of *Lancaster* aforesaid; and that, during all that time, all the liege subjects of our said lord the King had used and navigated upon the said cut or canal, with boats and other vessels not exceeding thirty tons burthen, at their free will and pleasure, upon payment of certain reasonable rates or duties in that behalf legally demanded, and still did use and navigate upon the same canal in manner aforesaid, to wit, in the county aforesaid; and that the said cut or canal, from the time of making thereof as aforesaid until the taking of that inquisition, by means of an aqueduct made in pursuance of the powers and provisions of the said act, had passed over and still passed over the river *Mersey* aforesaid in the course of the said river, to and towards the said place called the *Kemp Stones*, at a place in the said county of *Lancaster* near to the point of junction of the said river and a certain brook or watercourse in the county of *Lancaster*, called *Chorlton Brook*; and that the defendants, on the 1st day of *January*, 1770, and on divers other days and times between that day and the day of taking that inquisition, with force of arms &c., to wit, at *Stretford* aforesaid, in the county aforesaid, unlawfully, wilfully, and injuriously, did erect, raise, and place, divers mounds and embankments, to wit, &c., of great width, length, and height, to wit, &c., near to the antient banks of the said river *Mersey* and the said watercourse or brook called *Chorlton Brook* respectively, that is to say, in parts thereof respectively near to the said aqueduct, to wit, at *Stretford* aforesaid, in the county aforesaid, and the said

mounds and embankments so then erected, raised, and placed, from the time of the erecting, raising, and placing the same until the time of taking that inquisition, severally did wrongfully and injuriously keep and continue and cause to be kept and continued, and still kept and continued, to wit, at *Stretford* aforesaid, whereby divers large quantities of water, on the said 1st day of *January*, 1770, and on divers other days and times between that day and the day of taking that inquisition, had been and still were wrongfully and injuriously forced and made to flow and lodge unto, upon, and against the said aqueduct, and the sides and foundations of the said canal adjacent to the said aqueduct, which, on the several occasions aforesaid, ought to have flowed and escaped, and but for the mounds and embankments aforesaid would have flowed and escaped, by other ways (that is to say), over parts of the banks of the said river *Mersey* and the said watercourse respectively, to wit, at *Stretford* aforesaid, in the county aforesaid; whereby the said aqueduct, and the sides and foundations thereof and of the said canal adjoining to the said aqueduct, respectively, had been injured, and had been and then were placed in imminent danger of being broken down and destroyed, to wit, at *Stretford* aforesaid, in the county aforesaid: to the great damage of the said aqueduct and canal; to the great terror, imminent danger, and common nuisance of the liege subjects of this realm using and navigating upon the said canal with their boats and other vessels as aforesaid, and of the inhabitants and occupiers of the lands adjacent to the said aqueduct; to the evil example of all others in the like case offending; and to the damage of our said lord the late King, and of our said lord the now King, their crown and dignity. There were other counts, varying the charge. The defendants pleaded not guilty.

At the trial before Mr. Justice *Littledale*, at *Lancaster*, at the *Summer Assizes* in 1829, the jury acquitted some

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of the defendants, and as to the others found the following special verdict:—

“ In the year 1763, the navigable canal above mentioned was made, from *Longford Bridge*, in the township of *Stretford*, to the river *Mersey*, at a place called the *Kemp Stones*, in the township of *Halton*, in pursuance of the act of Parliament within mentioned (a), and all the liege subjects of our lord the King since the making of the canal have navigated, and still do navigate the same with boats not exceeding thirty tons burthen, at their free will and pleasure, paying therefore the rates and duties by law established. The canal extends in a direction from north to south, for half a mile and upwards, across a vale in the township of *Stretford*, through which vale the river *Mersey* runs; and the canal is upon the same level throughout, and is raised by artificial embankments on each side thereof throughout the whole of the said half mile and upwards, and is carried across the river by means of an aqueduct of one arch, which was built at the time of making the canal, and the capacity of which is seven hundred and ninety-two feet, viz. six hundred and forty-two feet above the water, and one hundred and fifty feet below the water. At the distance of about four hundred and thirty yards from the river, towards the north, the canal is supported upon three arches passing under it, which three arches were built at the time of the making the canal; and the capacity of which is fifteen hundred and seven feet, viz. five hundred and eighty-three feet above the water, nine hundred and twenty-four feet below the water; and at the distance of about one hundred and sixty yards from the river, towards the south, a culvert passes under the canal, which was built at the time of the making the canal, and the capacity of which is thirty-five feet;

(a) 2 Geo. 3, c. xi.

and, at the further distance of about three hundred yards from the said culvert, towards the south, another culvert passes under the canal, which was built by the trustees of the late Duke of *Bridgewater*, the proprietors of the canal, in the year 1806, the capacity of which is sixty-nine feet.

"Before and at the time of the making of the canal, there was a ford across the river at the spot where the aqueduct was built and is now situate, which ford was used by the occupier of the adjoining lands in carting hay from one side of the river to the other, and passed in a slanting direction from south-east to north-west, by a gradual descent to the water on one side, and a gradual rise on the opposite side.

"The river flows for several miles in a northerly direction, to a point at which it is joined by a brook called *Chorlton Brook*, flowing into the river in a direction from east to west, the capacity of which brook at its junction with the river is equal to one tenth of the capacity of the river at the same junction; and immediately upon the junction of the brook the river makes a bend, and flows in a westerly direction for the distance of about eight hundred yards, until it arrives at the aqueduct, and, after passing under the same, flows in a westerly direction under a bridge in the turnpike road from *Manchester* to *Altringham*,

"On each side of the river, and also of the brook, there now are artificial banks, called fenders, made for the purpose of preventing the flowing down of the river and the brook in times of flood from overflowing the lands respectively adjoining the same; and the said fenders have from time to time been raised, as occasion has required, by the proprietors and occupiers of the adjoining lands; and the fenders on the banks of the river, on the north side thereof, now are three feet higher than they were twenty years ago; and the fenders on the banks of the brook, on the

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north side thereof, now are two feet three inches than they were twenty years ago.

"Near to the point of the junction of the river brook, a natural ridge of high land runs in a northerly direction from the river towards a pool called *Hole*, and within two hundred yards of the said pool the high lands on the other side of the said pool, within two hundred yards of the said pool, leaving of two hundred and twenty yards of low land between said two ridges of high land.

"The natural fall of the lands adjoining the north of the river after its junction with the brook, and westward of the said natural ridge of high land, is under the said three arches under the canal; and the natural fall of the lands west of the said low land adjoining the pool, is towards the said three arches; and the natural fall of the lands east of the said low land adjoining the pool is towards the brook; and the said low land adjoining to the said pool is eight inches and one quarter of an inch higher than the land immediately adjoining under the north bank of the brook.

"Before the banks of the river and of the brook were raised as above mentioned, the water of the river, at flood, was frequently penned back up the brook over the north bank of the brook, and inundated the land between the brook and the low land adjoining the pool called *Sally's Hole*, and, continuing to rise, flowed over the low land adjoining to the said pool, and in its way, passing by a place called *Turn Moss* and under the three arches above mentioned, and, after flowing through the same, flowed along a tract of low land, and it fell into the river again at a place called *Er*, at the distance of two miles from the said three arches, undating in its course, both above and below the said three arches, many hundred acres of land, and doing much mischief; and the lands between the said pool called

Hole and the said arches, were at that time, and still are, intersected with common hedges and ditches, which the flood-water threw down from time to time; but no regular watercourse was ever kept open for the said flood-water.

" Since the banks of the river and of the brook have been raised as above mentioned, the flood-water, whenever the same has flowed over or has broken down the banks of the brook, has taken the same course, flowing by the said pool called *Sally's Hole*, past the said place called *Turn Moss House*, to the said three arches; and the whole of the said three arches are not necessary for any other purpose than for the passage of such flood-water, but one arch of small dimensions would be sufficient to pass all the drainage and other water, except flood-water, from time to time collected at the spot where the said three arches are.

" Since the making of the canal, the water of the river has at different times flowed over the banks much higher up the river than the point of its junction with the brook, and has inundated a tract of land, called *Sale Eye*, by the river on the east and north, and by the canal on the west; and, by reason of the embankment on which the canal is raised, and of the want of sufficient outlets under the same, the said flood-water has been penned up on the said land called *Sale Eye*, and has in some instances, and particularly in the year 1806, broken down the south bank of the river between the aqueduct and the brook, and has passed into and across the river, and has broken down the north bank of the same, and, after inundating the adjoining lands, has flowed down to the said three arches.

" In the year 1806, complaints were made to the commissioners acting under the act of parliament, by the owners and occupiers of land on the north side of the river, of the damages occasioned to their lands by the flood-water so coming over from the said tract of land called *Sale Eye*, and of the insufficiency of the outlets under the

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embankment of the canal on the south side of the river; and the trustees of the said Duke of Bridgewater, the proprietors of the canal, made compensation at that time to the said owners and occupiers of land for the damages so sustained, and have also since that time paid an annual rent or compensation to the owner of one field, part of the said land called *Salé Eye*, in respect of a portion of that field immediately adjoining the river on the south side, which was on that occasion washed away; and the trustees of the said Duke of Bridgewater, the proprietors of the canal, have from time to time repaired the south bank of the river, and the fender thereon, to the extent of fifty yards eastward from the canal."

The special verdict then described the particular fields and fenders belonging to the several defendants; and it appeared that every fender was much higher than the land to the north of it, and that the fenders on the banks of the river and brook had been raised from time to time within the last six years, and kept and continued so raised by the defendants severally in their respective occupations, but not jointly. It also described the level of the lands through which the flood-water was accustomed to escape in the direction of the three arches as first above mentioned, and also the level of the bed of the river for some miles above its junction with the brook. A statement was then given of injuries sustained in July, 1828, when the flood-water broke the banks of the river and canal (the navigation of which was stopped), and ultimately flowed down to the three arches above mentioned. It then proceeded as follows:—

"The improved drainage of the country higher up the river for many miles, has occasioned a greater quantity of water to flow down the river to the aqueduct than used to flow down the same river to the said aqueduct for several years immediately after the same was built, but the aqueduct is still of sufficient capacity for the passage of the waters of the river at all times except in times of high floods. The raising of the fenders on the banks of the

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river and of the brook has occasioned a much greater quantity of water in times of high floods to flow to and against the aqueduct than did or could flow to and against the same for several years immediately after the aqueduct was built, and has rendered the aqueduct insufficient for the passage of the waters of the river in times of high floods, and has thereby greatly endangered the safety of the canal. If the sunders on the banks of the river and of the brook were reduced to the height at which they were twenty years ago, a great part of the waters of the river and the brook, in times of high floods, would overflow the banks of the brook, and would inundate the neighbouring lands, and would flow in the direction in which it used formerly to flow by the said pool called *Sally's Hole*, passing the said place called *Turn Moss House*, to the said three arches, and so to the river at the said place called *Erinston*; but many hundred acres of land would be thereby inundated, and great injury would be sustained by the owners and occupiers of that land: and the sunders on the banks of the river and of the brook have not been raised more than is necessary to protect and prevent the said lands from being so inundated.

The Court of *King's Bench* having given judgment for the Crown (a); the defendants brought a writ of error, which was argued on a former day in this term.

Mr. F. Pollock, for the plaintiff in error.—The question is, upon whom is to be cast the inconvenience which, as the special verdict finds, has gradually arisen from the deposit of soil washed down by the flood of the river. It was incumbent on the canal proprietors to make and maintain a sufficient opening for the water to pass at all times; they have no right to keep things in the state in which they originally were, but are bound to accommodate their

(a) See 1 Barn. & Adolph. 874.

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works to the increased flow of the river, from whatever cause that may arise. It cannot be supposed that the waters of the river ought of right to flow over the lands of the defendants, to the destruction of a large tract of valuable property.

Mr. Wightman, contra.—The defendants had no right to bank up the sides of the river so high as to interfere with the vested rights of the canal company. The special verdict finds, that, until the banks were so raised, the arches were found sufficient to carry off all the water of the river: but that, since they have been raised, the water cannot find its way to the three arches, but flows to the one arch, to the great damage of the canal.

Mr. F. Pollock was heard in reply.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court:—

Upon this special verdict, in which judgment has been given for the Crown by the Court of *King's Bench*, such judgment appears to have proceeded expressly upon the principle that the antient course and outlet of the flood-water had been obstructed by the wrongful raising from time to time of the fenders therein described by the defendants below. Whilst, however, we agree in the principle so laid down by the Court, we are unable to discover upon this special verdict a finding of sufficient facts to warrant its application to the present case.

In order to shew the defendants to have been guilty of the offence charged in this indictment, we think, in the first place, it ought to appear distinctly upon the special verdict that the raising and heightening of the fenders on the lands of the respective defendants was not an accustomed and rightful usage which has obtained from time to

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time; that it was an enjoyment commencing since the construction of the canal in 1763, not sanctioned by antient usage, or by the ordinary right which every man possesses *prima facie* to protect his own property, provided he can do it without injury to others: and that it ought also to appear distinctly that the course which the flood-water is stated in the special verdict to have taken, and by which it was carried again into the river at a lower point, was the antient and rightful course which it ought to take. And we think, in the second place, it ought not to be left in doubt upon the facts found in the verdict, whether the raising the fenders to their present height has or has not become necessary in consequence of the construction of the aqueduct and embankment. On the contrary, that it ought to appear distinctly upon the finding by the jury, either that the embankment and the aqueduct have not wrongfully penned back more water upon the low lands of the defendants than was formerly collected in times of flood, or that the banks of the river and brook have been raised without any necessity, and not in self defence against the consequences of the construction of the embankment and aqueduct; or, at all events, that the banks have been raised by the defendants to an unreasonable and unnecessary height: and, if these facts are left in doubt upon the special verdict, we think no judgment can be given against the defendants.

Upon the point firstly above suggested, there appears no doubt but that at common law the landholder would have the right to raise the banks of the river and brook, from time to time, as it became necessary, upon their own lands, so as to confine the flood-water within the banks, and to prevent it from overflowing their own lands—with this single restriction, that they did not thereby occasion any injury to the lands or property of other persons: and, if this right had actually been exercised and enjoyed by them before the passing of the act, then the construction

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of the aqueduct and embankment may be considered as having taken place subject to the enjoyment of such rights as the landholders possessed at the time of passing the act, unless so far as the act of parliament may have restrained the exercise of such rights. It appears, therefore, to us to be indispensable, in order to determine whether the acts of the defendants stated in the indictment are wrongful or not, that the jury should find such facts as will enable us to say with certainty whether, before the making of the canal and the embankment, there was any exercise by the landholders of the right of raising and heightening the banks from time to time and as occasion required, so as to confine the water at all times to the ordinary channel, and prevent it in times of flood from overflowing the banks, or whether the passage over the banks in times of flood was the usual and ordinary course. But the present special verdict leaves the commencement of the enjoyment of this right in complete uncertainty. It states only that there "now are" on each side of the river and brook artificial banks, called fenders, which have from time to time been raised as occasion has required. It finds indeed, in one part, that these banks are not raised higher than is necessary—a fact very strongly in favour of the defendants. But it gives no date whatever to the origin of these acts of enjoyment on the part of the owners of land adjacent to the river. Upon such a finding, we do not feel ourselves competent to say whether the acts complained of in the indictment amount to a nuisance or not.

Again, the jury find, that, before the banks of the river and brook were raised, the water of the river and brook was frequently penned back and flowed over the north bank by a track or course which is described in the verdict, and which is stated to fall into the river again at a place called *Erinston*, about two miles below the three arches. But it no where appears whether the flood-water was carried in that course *before* the aqueduct was made,

nor whether it had been so carried, for such a period of years over the lands of different persons as to constitute a right of watercourse in time of flood, in the direction described by the special verdict. But, in order to establish the charge against the defendants, it is essential to show, that, by their raising and heightening the banks of the river and brook, they prevented the water, in time of flood, from flowing in this particular course. We ought, therefore, to see upon the face of the verdict that there was an existing right of this course for the flood-water over the lands described in the verdict before we hold the defendants guilty of the offence charged.

Again, upon the second ground above suggested, we think this special verdict deficient. The special verdict leaves it questionable whether the nuisance complained of, (*i. e.*) the danger to the aqueduct and the canal, is not attributable, in some degree at least, if not entirely, to the act of the owners of the canal. The special verdict states, in terms, that, since the making of the canal, the water of the river has at different times flowed over the banks much higher up the within-mentioned river than the point of its junction with the brook; and then proceeds to state an instance of damage done in 1806, for which the commissioners named in the act of parliament awarded compensation, on account of the insufficiency of the outlets under the canal embankments. Again, in the statement made of the level of the river above the aqueduct, and of the fall immediately below, an inference at least is afforded that the embankment and the canal have contributed to the penning back the water, thus creating a necessary and justifiable ground for raising and heightening the banks.

Without, however, in any manner asserting that such has been the case, or that such is the necessary inference from the facts stated, we only observe that this special verdict does not state with sufficient certainty what is the real cause of the penning back of the water in time of flood,

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nor whether the raising and heightening of the banks by the defendants had a legal and justifiable commencement, nor what is the rightful course of the flood-water; nor, generally, does it lay before the Court such facts as will enable us to say whether the acts done by the defendants are lawful or not, or to give any judgment, satisfactorily to ourselves, that should bind the rights of the contending parties.

Under these circumstances, the only course we can pursue is, to reverse the judgment which has been given for the Crown, and to award a *venire de novo*; and, if another special verdict should be found, we think it would be desirable that it should contain an express finding of the jury upon the several points to which we have above adverted, rather than the statement of facts from which the finding of the jury is only to be inferred.

Venire de novo awarded.

Regulæ Generales.

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WHEREAS it is expedient that the practice of the Courts of *King's Bench*, *Common Pleas*, and *Exchequer of Pleas*, should, as far as possible, be rendered uniform:

It is ordered, That the practice to be observed in the said Courts, with respect to the matters hereinafter mentioned, shall be as follows; that is to say—

AUTHORITY TO PROSECUTE OR DEFEND.

1. Warrants of attorney to prosecute or defend shall not be entered on distinct rolls, but on the top of the issue roll. *Tidd*, 95 (a).

Entry of warrant to sue or defend.

2. A special admission of *prochein amy*, or guardian, to prosecute or defend for an infant, shall not be deemed an authority to prosecute or defend in any but the particular action or actions specified. *Id.* 100.

Admission of *prochein amy*.

AFFIDAVIT.

3. No affidavit of the service of process shall be deemed sufficient if made before the plaintiff's own attorney, or his clerk. *Id.* 242.

Of service of process.

4. An affidavit sworn before a Judge of any of the

Not intitled, when received.

(a) These references are to the 9th edition of *Tidd's Practice*, shewing in what consists the alteration in the practice effected by these rules.

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Courts of *King's Bench*, *Common Pleas*, or *Exchequer*, shall be received in the Court to which such Judge belongs, though not intitled of that Court; but not in any other Court, unless intitled of the Court in which it is to be used. *Id.* 492.

Addition of deponent.

5. The addition of every person making an affidavit shall be inserted therein. *Id.* 493.

Before whom sworn.

6. Where an agent in town or an attorney in the country is the attorney on the record, an affidavit sworn before the attorney in the country shall not be received; and an affidavit sworn before an attorney's clerk shall not be received in cases where it would not be receivable if sworn before the attorney himself; but this rule shall not extend to affidavits to hold to bail. *Id.* 494.

ARREST.

Second arrest.

7. After *non-pros.*, nonsuit, or discontinuance, the defendant shall not be arrested a second time without the order of a Judge. *Id.* 175.

Affidavits for work and labour, and money paid.

8. Affidavits to hold to bail for money paid to the use of the defendant, or for work and labour done, shall not be deemed sufficient unless they state the money to have been paid, or the work and labour to have been done, at the request of the defendant. *Id.* 184.

No supplemental affidavits.

9. No supplemental affidavit shall be allowed to supply any deficiency in the affidavit to hold to bail. *Id.* 189.

Variance between *ac etiam* and declaration, or want of *ac etiam*, not to relieve bail or discharge the defendant, but bail to stand for 40*l.*

10. A variance between the *ac etiam* and the declaration, or the want of an *ac etiam*, where the defendant is arrested, shall not be deemed ground for discharging the defendant, or the bail; but the bail-bond or recognizance of bail shall be taken with a penalty or sum of 40*l.* only. *Id.* 294, 450.

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WRIT, WHEN AND HOW TO BE FILED.

11. When the rule to return a writ expires in vacation, the sheriff shall file the writ at the expiration of the rule, or as soon after as the office shall be open. *Id.* 307.

Sheriff, when ruled, to return writ in vacation.

12. And the officer with whom it is filed shall indorse the day and hour when it was filed. *Id.* 308.

Officer to indorse hour when filed.

BAIL.

13. If any person put in as bail to the action, except for the purpose of rendering only, be a practising attorney, or clerk to a practising attorney, the plaintiff may treat the bail as a nullity, and sue upon the bail-bond as soon as the time for putting in bail has expired, unless good bail be duly put in in the meantime. *Id.* 247, 248.

Attorney or clerk may be bail to render.

14. In the case of country bail, the bail-piece shall be transmitted and filed within eight days, unless the defendant reside more than forty miles from *London*, and, in that case, within fifteen days after the taking thereof. *Id.* 252.

Country bail-piece, when transmitted.

15. When bail to the sheriff become bail to the action, the plaintiff may except to them, though he has taken an assignment of the bail-bond. *Id.* 255.

Exception to bail to the sheriff.

16. It shall be sufficient, in all cases, if notice of justification of bail be given two days before the time of justification. *Id.* 260.

Two days' notice of justification to be given.

17. If bail, either to the action or in error, are excepted to in vacation, and the notice of exception require them to justify before a Judge, the bail shall justify within four days from the time of such notice, otherwise on the first day of the ensuing term. *Id.* 260.

Bail excepted to in vacation, when to justify.

18. Notice of more bail than two shall be deemed irregular, unless by order of the Court or a Judge. *Id.* 266.

More than two bail irregular, without leave.

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Affidavits of justification.

19. Affidavits of justification shall be deemed insufficient, unless they state that each person justifying is worth the amount required by the practice of the Courts, over and above what will pay his just debts, and over and above every other sum for which he is then bail. *Id.* 267.

Bail rejected may render.

20. Bail, though rejected, shall be allowed to render the principal without entering into a fresh recognizance. *Id.* 275.

Liability of bail.

21. Bail shall only be liable to the sum sworn to by the affidavit of debt, and the costs of suit; not exceeding in the whole the amount of their recognizance. *Id.* 280.

Time for rendering.

22. Bail shall be at liberty to render the principal at any time during the last day for rendering, so as they make such render before the prison doors are closed for the night. *Id.* 284.

No proceedings on bail-bond pending body rule;

23. A plaintiff shall not be at liberty to proceed on the bail-bond pending a rule to bring in the body of the defendant. *Id.* 297.

nor till four days in town, and eight in country causes from appearance day.

24. No bail-bond taken in *London* or *Middlesex* shall be put in suit until after the expiration of four days, nor, if taken elsewhere, till after the expiration of eight days, exclusive, from the appearance day of the process. *Id.* 299.

Time to except to bail on *habeas corpus*.

25. The time allowed for excepting to bail put in upon a *habeas corpus* shall be twenty days. *Id.* 409.

Recognizance of bail in error.

26. A recognizance of bail in error shall be taken in double the sum recovered, except in case of a penalty, and, in case of a penalty, in double the sum really due, and double the costs. *Id.* 1156.

In ejectment.

27. In ejectment, the recognizance of bail in error shall be taken in double the yearly value, and double the costs. *Id.* 1252.

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BAIL-BOND, AND ACTION THEREON.

28. An action may be brought upon a bail-bond by the sheriff-himself, in any Court. *Id.* 300. By sheriff.

29. In all cases where the bail-bond shall be directed to stand as a security, the plaintiff shall be at liberty to sign judgment upon it. *Id.* 304, 305. Where bail-bond security, plaintiff may sign judgment on it.

30. Proceedings on the bail-bond may be stayed on payment of costs in one action, unless sufficient reason be shewn for proceeding in more. *Id.* 542. Staying proceedings on.

APPEARANCE.

31. A defendant who has been served with process by original shall enter an appearance within four days of the appearance day, if the action is brought in *London or Middlesex*, or within eight days of the appearance day in other cases, otherwise the plaintiff may enter an appearance for him according to the statute; and any attorney who undertakes to appear shall enter an appearance accordingly. *Id.* 240. Entry of appearance to process by original.

IRREGULARITY IN PROCESS AND PROCEEDINGS.

32. Where the defendant is described in the process or affidavit to hold to bail by initials, or by a wrong name, or without a Christian name, the defendant shall not be discharged out of custody, or the bail-bond delivered up to be cancelled, on motion for that purpose, if it shall appear to the Court that due diligence has been used to obtain knowledge of the proper name. *Id.* 148. Mistake of defendant.

33. No application to set aside process or proceedings for irregularity shall be allowed, unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity. *Id.* 513. Setting aside proceedings for irregularity.

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Double pleading.

34. If a party plead several pleas, avowries, or cognizances, without a rule for that purpose, the opposite party shall be at liberty to sign judgment. *Id.* 567.

DECLARATION, AND TIME FOR.

Time for declaring.

35. A plaintiff shall be deemed out of Court unless he declare within one year after the process is returnable. *Id.* 299.

Declaring against prisoner.

36. When the plaintiff declares against a prisoner, it shall not be necessary to make more than two copies of the declaration, of which one shall be served and another filed, with an affidavit of service; upon the office copy of which affidavit a rule to plead may be given. *Id.* 344, 455.

Rule to declare, on removal of cause.

37. Where a cause has been removed from an inferior court, the rule to declare may be given within four days after the end of the term in which the writ is returned. *Id.* 417, 418.

No rule to declare in general—
in the *Exchequer*.

38. It shall not be necessary for a defendant in any case to give a rule to declare, except upon removals from inferior courts; but the plaintiff may have a rule for time to declare in the Court of *Exchequer* as well as in the other Courts. *Id.* 422.

Rule to declare peremptorily.

39. A rule to declare peremptorily may be absolute in the first instance. *Id.* 424.

Effect of variance in *venue*.

40. A declaration laying the *venue* in a different county from that mentioned in the process, shall not be deemed a waiver of the bail. *Id.* 432.

Form of notice of declaration.

41. It shall not be deemed necessary to express the amount of damages in a notice of declaration. *Id.* 457.

No rule to plead necessary after amendment of declaration.

42. Where an amendment of the declaration is allowed, no new rule to plead shall be deemed necessary, whether such amendment be made of the same term as the declaration, or of a different term. *Id.* 409, 475.

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PLEA, AND TIME FOR.

43. A demand of plea may be made at the time when the declaration is delivered, and may be indorsed thereon. *Id.* 476. Plea, when demanded.

44. If a defendant, after craving oyer of a deed, omit to insert it at the head of his plea, the plaintiff, on making up the issue or demurrer book, may, if he think fit, insert it for him, but the costs of such insertion shall be in the discretion of the taxing officer. *Id.* 589. Oyer of deed.

45. If the declaration be filed or delivered so late that the defendant is not bound to plead until the next term, the defendant may plead as of the preceding term, within the first four days of the next term, any plea to the jurisdiction or in abatement, or a tender, or any other similar plea. *Id.* 463, 639. Pleading without impanance.

46. The defendant shall not be at liberty to waive his plea without leave of the Court or a Judge. *Id.* 674. Waiver of plea.

PARTICULARS.

47. A summons for particulars and order thereon may be obtained by a defendant before appearance, and may be made, if the Judge think fit, without the production of any affidavit. *Id.* 596. Summons for particulars, how obtained.

48. A defendant shall be allowed the same time for pleading after the delivery of particulars under a Judge's order, which he had at the return of the summons; nevertheless, judgment shall not be signed till the afternoon of the day after the delivery of the particulars, unless otherwise ordered by the Judge. *Id.* 598. Time for pleading after.

NOTICES AND RULES, AND SERVICE THEREOF.

49. Where the residence of a defendant is unknown, Notice of decla-

ration, where defendant's residence is unknown.

Time for service of rules, orders, and notices.

Original rule, when to be shewn.

Term's notice of trial, &c., when given.

Rule to reply, when given.

Sufficient demand of replication, &c.

Paying money into Court.

Undertaking thereon.

Notice of trial and inquiry.

notice of declaration may be stuck up in the office, but not without previous leave of the Court. *Id.* 457.

50. Service of rules and orders and notices, if made before nine at night, shall be deemed good; but not if made after that hour. *Id.* 469.

51. It shall not be necessary to the regular service of a rule, that the original rule should be shewn, unless sight thereof be demanded, except in cases of attachment. *Id.* 500.

52. Where a term's notice of trial or inquiry is required, such notice may be given at any time before the first day of term. *Id.* 577.

53. A rule to reply may be given at any time when the office is open. *Id.* 676.

54. Service of a rule to reply or plead any subsequent pleading, shall be deemed a sufficient demand of a replication or such other subsequent pleading. *Id.* 676.

PAYMENT OF MONEY INTO COURT.

55. In all cases in which money may be paid into Court, leave to pay it in may be obtained by a side bar rule. *Id.* 621.

56. On payment of money into Court, the defendant shall undertake by the rule to pay the costs; and, in case of non-payment, to suffer the plaintiff either to move for an attachment, on a proper demand and service of the rule, or to sign final judgment for nominal damages. *Id.* 626.

TRIAL, AND NOTICE THEREOF.

57. Notice of trial and inquiry, and of continuance of inquiry, shall be given in town; but countermand of notice of trial or inquiry may be given either in town or country, unless otherwise ordered by the Court or a Judge. *Id.* 753.

58. The expression "short notice of trial" shall, in country causes, be taken to mean four days. *Id.* 472.

Short notice of trial.

59. In all cases where the plaintiff in pleading concludes to the country, the plaintiff's attorney may give notice of trial at the time of delivering his replication, or other subsequent pleading, and, in case issue shall afterwards be joined, such notice shall be available; but, if issue be not joined on such replication, or other subsequent pleading, and the plaintiff shall sign judgment for want thereof, and forthwith give notice of executing a writ of inquiry, such notice shall operate from the time that notice of trial was given as aforesaid; and, in all cases where the defendant demurs to the plaintiff's declaration, replication, or other subsequent pleading, the defendant's attorney, or the defendant, if he plead in person, shall be obliged to accept notice of executing a writ of inquiry on the back of the joinder in demurrer; and in case the defendant pleads a plea in bar, or rejoinder, &c., to which the plaintiff demurs, the defendant's attorney, or the defendant if he plead in person, shall be obliged to accept notice of executing a writ of inquiry on the back of such demurrer. *Id.* 578.

Notice of trial, when given.

60. Notice of a trial at bar shall be given to the proper officer of the Court, before giving notice of trial to the party. *Id.* 750.

Of trial at bar.

61. In country causes, or where the defendant resides more than forty miles from town, a countermand of notice of trial shall be given six days before the time mentioned in the notice for trial, unless short notice of trial has been given. *Id.* 757.

Countermand of notice in country causes—

62. In town causes, where the defendant lives within forty miles of town, two days' notice of countermand shall be deemed sufficient. *Id.* 757.

in town causes.

63. The rule for a view may in all cases be drawn up by the officer of the Court, on the application of the party, without affidavit or motion for that purpose. *Id.* 797.

Rule for a view, how obtained.

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NEW TRIAL, MOTION IN ARREST OF JUDGMENT, &c.

Costs where
new trial granted.

64. If a new trial be granted, without any mention of costs in the rule, the costs of the first trial shall not be allowed to the successful party, though he succeed on the second. *Id.* 916.

Motion in arrest
of judgment,
when made.

65. No motion in arrest of judgment, or for judgment *non obstante veredicto*, shall be allowed after the expiration of four days from the time of trial, if there are so many days in term, nor in any case after the expiration of the term, provided the jury process be returnable in the same term. *Id.* 928.

JUDGMENT, AND TIME FOR SIGNING.

Judgment for
want of plea,
when signed.

66. Judgment for want of a plea, after demand, may in all cases be signed at the opening of the office in the afternoon of the day after that on which the demand was made, but not before. *Id.* 477.

After inquiry.

67. After the return of a writ of inquiry, judgment may be signed at the expiration of four days from such return;

After verdict or
nonsuit.

and, after a verdict or nonsuit, on the day after the appearance day of the return of the *distringas* or *habeas corpora*, without any rule for judgment. *Id.* 581, 903.

JUDGMENT AS IN CASE OF A NONSUIT.

Rule for, how
obtained.

68. A rule *nisi* for judgment as in case of a nonsuit may be obtained on motion, without previous notice; but in that case it shall not operate as a stay of proceedings. *Id.* 491.

Time for.

69. No motion for judgment as in case of a nonsuit shall be allowed after a motion for costs for not proceeding to trial for the same default; but such costs may be moved for separately, *i. e.* without moving at all for judgment as in case of a nonsuit, or after such motion is disposed of; or the Court, on discharging a rule for judgment as in case

of a nonsuit, may order the plaintiff to pay the costs of not proceeding to trial; but the payment of such costs shall not be made a condition of discharging the rule. *Id.* 759.

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70. No entry of the issue shall be deemed necessary to entitle a defendant to move for judgment as in case of a nonsuit, or to take the cause down to trial by proviso. *Id.* 761.

No entry of issue necessary.

71. No trial by proviso shall be allowed in the same term in which the default of the plaintiff has been made, and no rule for a trial by proviso shall be necessary. *Id.* 761.

Trial by proviso.

WARRANT OF ATTORNEY AND COGNOVIT.

72. No warrant of attorney to confess judgment, or *cognovit actionem*, given by any person in custody of a sheriff or other officer upon *mesne* process shall be of any force, unless there be present some attorney on behalf of such person in custody expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant or *cognovit* before the same is executed, which attorney shall subscribe his name as a witness to the due execution thereof, and declare himself to be attorney for the defendant, and state that he subscribes as such attorney. *Id.* 549, 560, 607.

Warrant of attorney or *cognovit* by a person in custody.

73. Leave to enter up judgment on a warrant of attorney above one and under ten years old must be obtained by a motion in term, or by order of a Judge in vacation; and, if ten years old or more, upon a rule to shew cause. *Id.* 533.

Entering up judgment on an old warrant of attorney.

COSTS.

74. No costs shall be allowed on taxation to a plaintiff upon any counts or issues upon which he has not succeeded; and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs. *Id.* 975.

Costs of counts and issues against plaintiff.

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EXECUTION.

Signing and
sealing.

75. It shall not be necessary that any writ of execution should be signed; but no such writ shall be sealed till the judgment paper, *postea*, or inquisition, has been seen by the proper officer. *Id.* 999, 1027.

Hab. fac. poss.
without *præ-*
cipe.

76. A writ of *habere facias possessionem* may be sued out without lodging a *præcipe* with the officer of the Court. *Id.* 1244.

Ca. sa. to fix
bail.

77. In actions commenced by bill, a *ca. sa.* to fix bail shall have eight days between the *teste* and return; and in actions commenced by original, fifteen; and must, in *London* and *Middlesex*, be entered four clear days in the public book at the sheriff's office. *Id.* 1098.

SCIRE FACIAS.

Rule to quash,
after appearance.

78. A plaintiff shall not be allowed a rule to quash his own writ of *scire facias*, after a defendant has appeared, except on payment of costs. *Id.* 947.

To revive a
judgment.

79. A *scire facias* to revive a judgment more than ten years old shall not be allowed without a motion for that purpose in term, or a Judge's order in vacation; nor, if more than fifteen, without a rule to shew cause. *Id.* 1105.

On recogni-
sance.

80. A *scire facias* upon a recognizance taken in Serjeants' Inn, or before a commissioner in the country, and recorded at *Westminster*, shall be brought in *Middlesex* only; and the form of the recognizance shall not express where it was taken. *Id.* 1122.

Judgment in.

81. No judgment shall be signed for non-appearance to a *scire facias* without leave of the Court or a Judge, unless the defendant has been summoned; but such judgment may be signed by leave after eight days from the return of one *scire facias*. *Id.* 1125.

82. A notice in writing to the plaintiff, his attorney, or agent, shall be a sufficient appearance by the bail or defendant on a *scire facias*. *Id.* 1127.

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Appearance.

ERROR.

83. A writ of error shall be deemed a *supersedeas* from the time of the allowance. *Id.* 530.

Writ of error deemed a *supersedeas*.

84. To entitle bail to a stay of proceedings pending a writ of error, the application must be made before the time to surrender is out. *Id.* 532.

Stay of proceedings.

SUPERSEDEAS.

85. The plaintiff shall proceed to trial or final judgment against a prisoner within three terms inclusive after declaration, and shall cause the defendant to be charged in execution within two terms inclusive after such trial or judgment; of which the term in or after which the trial was had shall be reckoned one. *Id.* 362.

Proceedings against prisoners.

86. The Marshal of the *King's Bench* Prison, and the Warden of the *Fleet*, shall present to the Judges of the Courts of *King's Bench*, *Common Pleas*, and *Exchequer*, in their respective Chambers at *Westminster*, within the first four days of every term, a list of all such prisoners as are supersedeable; shewing as to what actions and on what account they are so, and as to what actions (if any) they still remain not supersedeable. *Id.* 366.

List of supersedeable prisoners to be presented to the Judges of the respective Courts within the four first days of every term.

87. If, by reason of any writ of error, special order of the Court, agreement of parties, or other special matter, any person detained in the actual custody of the Marshal of the *King's Bench* Prison or Warden of the *Fleet*, be not entitled to a *supersedeas* or discharge, to which such prisoner would, according to the general rules and practice of the Court, be otherwise entitled, for want of declaring, proceeding to trial or judgment, or charging in execution, within the times prescribed by such general rules

Cause of detain-er to be entered.

1832.

and practice, then, and in every such case, the plaintiff or plaintiffs at whose suit such prisoner shall be so detained in custody, shall, with all convenient speed, give notice in writing of such writ of error, special order, agreement, or other special matter, to the Marshal or Warden, upon pain of losing the right to detain such prisoner in custody by reason of such special matter; and the Marshal or Warden shall forthwith, after the receipt of such notice, cause the matter thereof to be entered in the books of the prison, and shall also present to the Judges of the respective Courts from time to time a list of the prisoners to whom such special matter shall relate, shewing such special matter, together with the list of the prisoners supersedeable. *Id.* 367.

Prisoners supersedeable, to be discharged.

88. All prisoners who have been or shall be in the custody of the Marshal or Warden for the space of one calendar month after they are supersedeable, although not superseded, shall be forthwith discharged out of the *King's Bench* or *Fleet Prison* as to all such actions in which they have been or shall be supersedeable. *Id.* 367.

Order for discharge of prisoner, how obtained.

89. The order of a Judge for the discharge of a prisoner on the ground of a plaintiff's neglect to declare, or proceed to trial or final judgment or execution in due time, may be obtained at the return of one summons served two days before it is returnable; such order in town causes being absolute, and, in country causes, unless cause shall be shewn within four days, or within such further time as the Judge shall direct. *Id.* 369.

Prisoner in execution a year for a debt under 20*l.*

90. A rule or order for the discharge of a debtor who has been detained in execution a year for a debt under 20*l.*, may be made absolute in the first instance, on an affidavit of notice given ten days before the intended application, which notice may be given before the year expires. *Id.* 388.

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ATTORNEY AND HIS BILL.

91. An order to deliver or tax an attorney's bill may be made at the return of one summons, the same having been served two days before it is returnable. *Id.* 535, 336.

Summons to deliver or tax.

92. One appointment only shall be deemed necessary for proceeding in the taxation of costs or of an attorney's bill. *Id.* 336.

One appointment.

93. No set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's *lien* for costs in the particular suit against which the set-off is sought; provided, nevertheless, that interlocutory costs in the same suit awarded to the adverse party may be deducted. *Id.* 339, 680.

No set-off to prejudice attorney's *lien*.

MISCELLANEOUS.

94. It shall not be necessary that a *pluries capias* be stamped by the clerk of the warrants, to authorize the Exigenter to make out an *exigent*. *Id.* 132.

Pluries capias not stamped for *exigent*.

95. In order to charge a defendant in execution, it shall not be necessary that the proceedings be entered of record. *Id.* 363, 365.

Charging defendant in execution.

96. Side bar rules may be obtained on the last as well as on other days in term. *Id.* 498.

Side bar rules.

97. A rule may be enlarged, if the Court think fit, without notice. *Id.* 502.

Enlarging rules.

98. An application to compel the plaintiff to give security for costs must, in ordinary cases, be made before issue joined. *Id.* 537.

Security for costs.

99. Leave to compound a penal action shall not be given in cases where part of the penalty goes to the Crown, unless notice shall have been given to the proper officer; but in other cases it may. *Id.* 557.

Leave to compound penal actions.

100. Where the defendant, after having pleaded, is al-

Withdrawing plea.

1832.

lowed to confess the action, he may withdraw his plea in person, without the appearance of the attorney or his clerk for that purpose before the officer of the Court. *Id.* 560.

Jury on writs of inquiry.

101. There shall be no rule for the sheriff to return a good jury upon a writ of inquiry, but an order shall be made by a Judge upon summons for that purpose. *Id.* 576.

Inspection of court rolls.

102. An order upon the lord of a manor to allow the usual limited inspection of the court rolls, on the application of a copyhold tenant, may be absolute in the first instance, upon an affidavit that the copyhold tenant has applied for and been refused inspection. *Id.* 594.

Changing the venue.

103. In cases where the application for a rule to change the venue is made upon the usual affidavit only, the rule shall be absolute in the first instance; and the venue shall not be brought back, except upon an undertaking of the plaintiff to give material evidence in the county in which the venue was originally laid. *Id.* 608.

Paying money into Court, in consolidated actions.

104. Where money is paid into Court in several actions, which are consolidated, and the plaintiff, without taxing costs, proceeds to trial on one and fails, he shall be entitled to costs on the others up to the time of paying money into Court. *Id.* 616.

Entry of continuances.

105. After judgment by default, the entry of any subsequent continuances shall not be required. *Id.* 678.

Discontinuance after plea pleaded.

106. To entitle a plaintiff to discontinue after plea pleaded, it shall not be necessary to obtain the defendant's consent, but the rule shall contain an undertaking on the part of the plaintiff to pay the costs, and a consent, that, if they are not paid within four days after taxation, defendant shall be at liberty to sign a *non-provs.* *Id.* 680.

Pleas to country, not signed.

107. It shall not be necessary that any pleadings which conclude to the country be signed by counsel. *Id.* 693.

**Rule to rejoin,
where not ne-
cessary.**

Imparances.

Pauper, omitting to proceed to trial pursuant to notice.

**On bailable
process, debt
and costs to be
indorsed on the
writ.**

Form of indorsement.

FF

1552.

III.

In country cause, plaintiff may declare *de bene esse* four days after *Hilary* and *Trinity* Terms.

AND IT IS FURTHER ORDERED, That, in *Hilary* and *Trinity* Terms, a plaintiff in any country cause may file or deliver a declaration *de bene esse* within four days after the end of the term, as of such term.

IV.

Recital of writs in declarations.

AND IT IS FURTHER ORDERED, That the rules heretofore made in the Courts of *King's Bench* and *Common Pleas* respectively, for avoiding long and unnecessary repetitions of the original writ in certain actions therein mentioned, shall be extended and applied, in the Courts of *King's Bench*, *Common Pleas*, and *Exchequer of Pleas*, to all personal and mixed actions; and that in none of such actions shall the original writ be repeated in the declaration, but only the nature of the action stated, in manner following: viz. *A. B.* was attached to answer *C. D.* in a plea of trespass, or in a plea of trespass and ejectment, or as the case may be; and any further statement shall not be allowed in costs.

V.

Attachment or bail-bond, when to stand as a security.

AND IT IS FURTHER ORDERED, That, upon staying proceedings either upon an attachment against the sheriff for not bringing in the body, or upon the bail-bond, on perfecting bail above, the attachment or bail-bond shall stand as a security, if the plaintiff shall have declared *de bene esse*, and shall have been prevented, for want of special bail being perfected in due time, from entering his cause for trial, in a town cause, in the term next after that in which the writ is returnable; and, in a country cause, at the ensuing Assizes.

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VI.

AND IT IS FURTHER ORDERED, That the expense of a witness called only to prove the copy of any judgment, writ, or other public document, shall not be allowed in costs, unless the party calling him shall, within a reasonable time before the trial, have required the adverse party, by notice in writing, and production of such copy, to admit such copy, and unless such adverse party shall have refused or neglected to make such admission.

Costs of proving
copy of judgment, &c.

VII.

AND IT IS FURTHER ORDERED, That the expense of a witness called only to prove the handwriting to, or the execution of, any written instrument stated upon the pleadings, shall not be allowed, unless the adverse party shall, upon summons before a Judge, a reasonable time before the trial (such summons stating therein the name, description, and place of abode of the intended witness), have neglected or refused to admit such handwriting or execution, or unless the Judge, upon attendance before him, shall indorse upon such summons, that he does not think it reasonable to require such admission.

Costs of proving
handwriting.

VIII.

AND IT IS FURTHER ORDERED, That, in all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the Courts, the same shall be reckoned exclusively of the first day, and inclusively of the last day, unless the last day shall happen to fall on a *Sunday, Christmas Day, Good Friday*, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned exclusively of that day also.

Time, how to be
computed.

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Commencement
of rules.

AND IT IS FURTHER ORDERED, That the above rules
shall take effect on the first day of next *Easter* Term.

TENTERDEN,
N. C. TINDAL,
LYNDHURST,
J. BAYLEY,
J. A. PARK,
W. GARROW,
J. LITLEDALE,
S. GASELEE,

J. VAUGHAN,
J. PARKE,
W. BOLLAND,
J. B. BOSANQUET,
W. E. TAUNTON,
E. H. ALDERSON,
J. PATTESON.

END OF HILARY TERM.

CASES

ARGUED AND DETERMINED

IN THE

Court of Common Pleas.

EASTER TERM, 2 WILL. IV.

MEMORANDA.

1832.

DURING the last vacation, *John Gurney*, Esquire, of the *Inner Temple*, one of his Majesty's Counsel, and *John Taylor Coleridge*, Esquire, of *Lincoln's Inn*, were called to the degree of the coif. They gave rings with the motto—" *Justo secernere iniquum.*"

Sir William Garrow, one of the Barons of his Majesty's *Exchequer*, having resigned, *John Gurney*, Esquire, succeeded to the vacant seat on the Bench of that Court. On his appointment he received the honor of knighthood.

DOE, on the demise of THOMAS, v. ROE.

MR. Serjeant *Wilde* moved for judgment against the casual ejector. The affidavit of service of the declaration and notice stated a service upon a servant of the tenant,

Tuesday,
April 17th.

On motion for judgment against the casual ejector, the affidavit alleged a service of the declaration and

notice upon a servant of the tenant, upon the premises, the tenant being absent; and that the servant had subsequently stated that he had given them to his master:—*Held*, not sufficient.

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DOE
d.
THOMAS
v.
ROE.

upon the premises, the tenant himself not being in the way; and also that the servant to whom the declaration and notice were delivered had subsequently declared that he had given them to his master.

Lord Chief Justice. TINDAL.—That service might do coupled with any thing like an acknowledgment on the part of the tenant that the declaration and notice had come to his hands (a); or, an affidavit by the servant that he had delivered them to his master (b), or an affidavit of the refusal of the servant to make such affidavit, might be ground enough for a rule *nisi*: but at present the statement is not sufficient.

The rest of the Court concurring—

Rule refused.

(a) When the service is on the servant of the tenant in possession, and the tenant afterwards acknowledges the receipt of it, the affidavit to ground the motion for judgment should state when such acknowledgment was made (*Anonymous*, 2 Chit. Rep. 187); for, such acknowledgment is not sufficient to entitle the lessor of the plaintiff to judgment against the casual ejector, unless it be sworn to have been made

before the essoin day. See *Doe d. Tindale v. Roe*, 2 Chit. Rep. 180; *Doe d. Wilson v. Roe*, Adams's Eject. 209; *Doe d. Macdougall v. Roe*, 4 J. B. Moore, 20. Since the late statute, it may be any day before the first day of full term.

(b) See *Doe d. Teverell v. Snee*, 2 Dow. & Ryl. 5; *Doe v. Roe*, 2 Dow. & Ryl. 12; *Doe d. Walker v. Roe*, 1 Price, 399; *Doe d. Harvey v. Roe*, 2 Price, 112.

1832.

Tuesday,
April 17th.

WATSON v. WALKER.

MR. Serjeant *Merewether*, in the course of the last term, obtained a rule *nisi* to set aside a writ of false judgment, which had been brought to remove the cause from a court of inferior jurisdiction, and the sheriff's return thereto.

The affidavit upon which the motion was founded was intitled in the names of the parties in the court below.

Mr. Serjeant *Jones*, having on the last day of *Hilary* Term caused the rule to be enlarged, now shewed cause.—The affidavit upon which the motion is founded is improperly intitled, and therefore cannot be used. In the case of a writ of error brought by the defendant in the original cause, the parties are reversed; and, for this purpose, the writ of false judgment is analogous to the writ of error—the only difference between them being, that the writ of error lies from a court of record, and the writ of false judgment from a court not of record (*a*). In the case of *Gandell v. Rogier* (*b*), it was decided, that, where, a motion is made in a cause removed by writ of error to a superior Court, the affidavit must be intitled in the cause in error, and not in the original cause. There is in fact no such cause in this Court as that mentioned in the affidavit; consequently, perjury could not be assigned upon it.

Mr. Serjeant *Peake*, *contra*.—The affidavit is intitled in the only cause which in fact exists. In the case cited, it did not appear that the jurisdiction of the superior Court was questioned: here, on the contrary, the whole ground of the motion is, that this Court has no jurisdiction in the

Where a motion is made in a cause removed by writ of false judgment from a court of inferior jurisdiction, the affidavits must be intitled in the cause in error.

That an affidavit is so framed that perjury could not be assigned thereon, is a defect not to be cured by waiver.

(*a*) See the authorities upon this subject collected in the case of *Scott v. Bye*, 9 J. B. Moore, 649; S. C. 2 Bing. 344.
(*b*) 7 Dow. & Ryl. 259; S. C. 4 Barn. & Cress. 862.

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v.
WALKER.

matter, and therefore that the cause is not removed from the court below. Besides, the objection comes now too late: the defect, if any, is waived by the defendant below coming to enlarge the rule.

Lord Chief Justice TINDAL.—The affidavit of the motion is intitled "*In the Common Pleas*," when there is in fact no such cause in the *Common Pleas* as that there described. The objection is certainly very ungracious, and one that the Court would not be disposed to favour. The difficulty, however, that I feel is, that perjury could not be assigned upon such an affidavit. That is a defect that cannot be cured by waiver. I think the rule must be discharged.

The rest of the Court concurring—

Rule discharged, without costs.

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April 17th.

ADAMS v. BRIDGER.

By the 49 Geo. 3, c. 121, s. 14, it was enacted that the proving a debt should be deemed an election by the creditor to take the benefit of the commission. The plaintiff proved a debt under a commission sued out against the defendant by virtue of that act, and, after the passing of the 6 Geo. 4, c. 16 (which repealed the 49 Geo. 3, c. 121), arrested the defendant for the same debt—The Court directed the defendant to be discharged from custody; holding that the plaintiff's election to prove under the commission operated as a final abandonment of his claim against the person of his debtor.

A RULE was obtained by Mr. Serjeant *Wilde*, in the course of the last term, on the part of the defendant, calling on the plaintiff to shew cause why he should not be discharged out of custody at the plaintiff's suit, on the ground that the debt for which the action was brought had been proved under a commission of bankrupt issued against the defendant in the year 1816; and why the plaintiff should not pay the costs of the application.

The action was brought upon a bond given by the de-

fendant on the 15th of *July*, 1810. The debt was proved under the defendant's commission in the year 1816, and the action was commenced in the last *Hilary* Term.

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BRIDGER.

Mr. Serjeant *Bompas* now shewed cause.—The only question to be considered is, whether a party is precluded from bringing an action for a specialty debt that has been proved under a commission of bankrupt issued against his debtor under the statute 49 *Geo.* 3, c. 121, by the 14th section of which it was enacted, that, after the passing of the act, it should not be lawful for any creditor who had or should have brought any action, to prove a debt under the commission for any purpose, or to have the claim of a debt entered on the proceedings, without relinquishing such action; and that the proving or so claiming should be deemed an election by such creditor to take the benefit of the commission with respect to the debt so claimed or proved by him. This statute was repealed by the 6 *Geo.* 4, c. 16, and a similar provision substituted for the above, by section 59 (*a*). In the case of *Atherstone v. Huddleston* (*b*), the 14th section of the 49 *Geo.* 3, c. 121, was held to be prospective only, and not to apply to actions brought before the passing of that act. The words of the 59th section of the late act being of similar import with those of the clause upon which that decision turned, *Atherstone v. Huddleston* is an authority to shew that that section also is prospective only, and cannot apply to this case. It fol-

(*a*) The words of that section are as follow:—"That no creditor who has brought any action or instituted any suit against any bankrupt, in respect of a demand accruing prior to the bankruptcy, or which might have been proved as a debt under the commission against such bankrupt, shall prove a debt under such commission, or have any claim entered upon the

proceedings under such commission, without relinquishing such action or suit; and, in case such bankrupt shall be in prison or custody at the suit of or detained by such creditor, he shall not prove or claim as aforesaid, without giving a sufficient authority in writing for the discharge of such bankrupt."

(*b*) 2 Taunt. 181.

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lows therefore, that, the 49 *Geo. 3*, c. 121, which was the only law operating in restraint of the plaintiff's proceedings, being repealed by the 6 *Geo. 4*, c. 16, the rights of the plaintiff stand in the same situation as if that act had never existed. In the late case of *Key v. Goodwin* (*a*), where a question arose as to the enrolment of proceedings in bankruptcy under a repealed act, the present Lord Chief Justice of this Court said: "I take the effect of repealing a statute to be, to obliterate it as completely from the records of parliament as if it had never passed; and that it must be considered as a law that never existed, except for the purpose of those actions or suits which were commenced, prosecuted, and concluded, whilst it was an existing law." So, here, the instant the act which prohibited a party from suing for a debt after he had proved for it under his debtor's commission, ceased to exist, the prohibition itself ceased, and all rights which during its existence were in abeyance, reverted. In *Sartess v. Ellison* (*b*), Lord Tenterden said: "It has been long established, that, when an act of parliament is repealed, it must be considered (except as to transactions past and closed) as if it had never existed. That is the general rule; and we must not destroy that, by indulging in conjectures as to the intention of the legislature. We are therefore to look at the statute 6 *Geo. 4*, c. 16, as if it were the first that had ever been passed on the subject of bankruptcy." Suppose the statute of limitations were to be repealed, all rights which now are barred by it would undoubtedly revert.

Mr. Serjeant *Wilde*, in support of his rule, was stopped by the Court.

Lord Chief Justice TINDAL.—I think this rule must be made absolute. By the 14th section of the statute 49 *Geo.*

(*a*) 4 Moore & Payne, 341; S. C. 6 Bing. 576.

(*b*) 9 Barn. & Cress. 750; S. C. 4 Man. & Ryl. 586.

3, c. 121, the legislature has enacted, that, "after the passing of the act, it shall not be lawful for any creditor who has or shall have brought any action, to prove a debt under the commission for any purpose, or to have the claim of a debt entered on the proceedings, without relinquishing such action; and that the proving or so claiming shall be deemed an election by such creditor to take the benefit of the commission with respect to the debt so claimed or proved by him." It is clear, that, down to the time of the repeal of the act, no action could have been brought by this plaintiff in respect of the debt proved by him under the commission sued out against the defendant. It appears to me, that, so long as this act continued unrepealed, an election made by a creditor to prove his debt under a commission against his debtor, must be taken to be a *complete* election on his part to look to the estate only for the satisfaction of his claim. It is in substance the same as the entering a discontinuance upon the record. Although, from the instant an act of parliament is repealed, it may for some purposes be considered as if it had never existed; yet it is perfectly clear that it is not to be so considered with respect to acts done under it whilst it did exist as a law. The fallacy of the argument lies in treating the election not as a complete act.

As the proceeding was so very ungracious, I think the rule should be made absolute in the terms in which it is conceived.

Mr. Justice PARK and Mr. Justice GASELEE concurred.

Mr. Justice ALDERSON.—The election of the creditor to prove his debt under the commission operates as a final abandonment of his claim against the person of his debtor.

Rule discharged, with costs.

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Payment of interest within six years by one of several makers of a joint and several promissory note takes the case out of the statute of limitations as against all, notwithstanding the statute 9 Geo. 4, c. 14.

WYATT v. HENRY HODSON.

THIS was an action of *assumpsit* upon a promissory note drawn (in *November, 1824*.) by the defendant and one *James Hodson*, whereby they jointly or severally promised to pay to the plaintiff and his late partner, or order, the sum of 1,000*l.* The declaration contained a count upon the note and also the common money counts and a count for interest.

The defendant pleaded the general issue and the statute of limitations.

The cause was tried before Lord Chief Justice *Tindal*, at the Sittings at *Westminster*, after the last term. In order to take the case out of the statute of limitations, the plaintiff proved the payment of interest upon the note by *James Hodson* down to *December, 1828*. The note was signed by the defendant as surety for *James Hodson*.

On the part of the defendant, it was submitted that payment of interest by one joint-contractor did not exclude the operation of the statute of limitations, except as to the party making such payment—and the statute 9 Geo. 4, c. 14, was referred to.

A verdict was taken for the plaintiff—his Lordship conceiving that the 9 Geo. 4, c. 14, did not affect the situation of the parties: he however gave the defendant leave to move that the verdict might be set aside and a nonsuit entered.

Mr. Serjeant *Jones* accordingly, in the course of the last term, obtained a rule *nisi*.

Mr. Serjeant *Wilde* now shewed cause.—He referred to the following cases—*Whitcomb v. Whiting* (a), where

(a) 2 Doug. 652.

it was held that the acknowledgment of one of several drawers of a joint and several promissory note took the case out of the statute as against the others, and might be given in evidence in a separate action against any of the others—*Jackson v. Fairbank (a)*, where one of two makers of a joint and several promissory note became bankrupt, and the payee received a dividend under the commission on account of the note; this was held to prevent the other maker from availing himself of the statute of limitations, in an action brought against him for the remainder of the note, the dividend having been received within six years before the action brought—*Perham v. Raynall (b)*, where the acknowledgment of one only of several makers of a promissory note was held to take the case out of the statute as against the others, even though one had signed the note as a surety only—*Burleigh v. Stott (c)*, where payment of interest by A., on a joint and several note of A. and B., was held to be evidence of a promise by B., and to take the note out of the statute, though B. was a mere surety, and the payment was made without his knowledge—*Pease v. Hirst (d)*, where it was held that the payment of interest within six years by A., on the joint and several note of himself and three other persons (sureties), was evidence of an acknowledgment by all the joint makers of the note, so as to take the case out of the statute—and *Chippendale v. Thurston (e)*, which was to the same effect, and where Mr. Justice J. Parkes said: "The words of this proviso in the statute 9 Geo. 4, c. 14, are, that 'nothing herein contained shall alter or take away, or lessen the effect of any payment of any principal or interest by any person whatsoever.' I think, therefore, that this statute leaves

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v.
HODSON.

(a) 2 H. Blac. 340.

(b) 9 J. B. Moore, 566; S. C. 2 Bmg. 306.

(c) 2 Man. & Ryl. 93; S. C. 8 Barn. & Cress. 36.

(d) 10 Barn. & Cress. 122, which was decided since the passing of the statute 9 Geo. 4, c. 14.

(e) 4 Car & P. 98; which was also since the 9 Geo. 4, c. 14.

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WYATT
&
HODGSON.

the law, with respect to payment of interest, just as it was before: and, as the law stood before the passing of this act, a payment of interest by one of two joint makers of a promissory note would take the case out of the statute of limitations as to both"—and to the language of the statute 9 Geo. 4, c. 14—when he was stopped by the Court, who called upon—

Mr. Serjeant *Jones* and Mr. Serjeant *Andrews* to support the rule.—The case of *Whitcomb v. Whiting*, which may be called the leading case on this subject, is in direct opposition to *Bland v. Hasebrig (a)*, and has been since doubted in *Athins v. Tredgold (b)*, where that case was said to have carried the law to the furthest extent. There, *A.* and *B.* made a joint and several promissory note, and, after the lapse of six years, *A.* died, leaving *B.* one of his executors, who, ten years after *A.*'s death, paid interest on the note—not in his character of executor, but personally, as a maker of the note. In an action on the note by the executors of the payee against the executors of *A.*, alleging, first, a promise by the testator in his lifetime, and secondly, a promise by the executors after his death—it was held that the payment of interest by *B.* (who suffered judgment by default) within six years from the commencement of the action, was not sufficient to take the case out of the statute, so as to make *A.*'s executors liable. And Lord Chief Justice *Abbott* said (c): "The evidence was, a payment of interest by *Robert Tredgold* in his own right. *Whitcomb v. Whiting* was relied upon to shew that such payment would take the case out of the statute of limitations. It is not necessary to say whether that case, which is contrary to a former decision in *Ventris*, would be sustained, if reconsidered; but I am warranted in say-

(a) 2 Ventris, 151.

Barn. & Cress. 23.

(b) 3 Dow. & RyL.200; S. C. 2

(c) 2 Barn. & Cress. 28.

ing, by what fell from Lord *Ellenborough* in *Brandram v. Wharton* (a), that it ought not to be extended."

Before the passing of the statute 9 Geo. 4, c. 14, part payment or payment of interest was nothing more than an implied admission of the party's liability to the debt. The intention of that act was, to put an end to all difficulty with regard to parol proof of new promises to revive debts barred by the statute of limitations. The principal objects of the enactment in question were two—first, to prevent the continued liability of a party by reason of an act to which he was not privy—secondly, to place a payment of interest upon the same footing with an express promise in writing. The act appears to contemplate one of two or more joint contractors being made chargeable in respect of an acknowledgment or promise, *or otherwise*, and the others discharged. It enacts—"That no joint contractor, or executor or administrator of any contractor, shall lose the benefit of the said enactments (b), or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them." The act then provides "that nothing therein contained shall alter, or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever." Then follows this further provision—"That, in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited acts or this act, as to one or more of such joint contractors, or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment or promise, *or otherwise*, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom

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(a) 1 Barn. & Ald. 463.

(b) The statute of limitations.

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he shall recover, and for the other defendant or defendants against the plaintiff." The words "or otherwise" can only mean, by part payment of principal, or payment of interest. The argument on the other side calls upon the Court to give a greater effect to an implied promise (which is all that a payment of interest can amount to) than to an absolute written promise. It will be giving a narrow construction to the statute, and putting a force upon its words, to hold that the proviso as to payment of interest was meant by the legislature to be carried further than the principal clause to which it is appended. In the case of *Pease v. Hirst*, the attention of the Court was not drawn to the point now contended for.

Lord Chief Justice TINDAL.—It appears to me that the defendant in this case is not protected by the statute 9 Geo. 4, c. 14. In order rightly to understand the meaning of that act, we must see what was the state of things before it passed. In the case of *Burleigh v. Stott*, it was held that a payment of interest by *A.*, on the joint and several note of *A.* and *B.*, was evidence of a promise by *B.*, and took the note out of the statute of limitations, though *B.* was a mere surety, and the payment was made without his knowledge. The circumstances of that case were parallel with those of the case now before the Court. Such, then, being the state of the law, the statute in question provides for promises made by one of two or more joint contractors. It begins by stating that "no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments (that is, the statute of limitations), or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby;" it then goes on to provide for the case of joint contractors—"And

where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor, or administrator, shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them." The legislature, therefore, has made a provision in favour of joint contractors not being parties to such written acknowledgment or promise. The act then proceeds, in general words—"Provided always, that nothing herein contained shall alter, or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever." These words apply to the general legislation of the act. Why does the statute say that the effect of the payment of any principal or interest shall not be affected, taken away, or lessened? Because, as I apprehend, the payment of principal or interest stands upon a very different footing from a mere verbal promise. A promise is frequently made rashly, and is always liable to misconstruction; whereas a payment is not to be supposed to be made unadvisedly. A person may part with his words rashly; not so with his money. It seems to me, therefore, that payment was conceived by the legislature to be such an act as would take the case out of the statute of limitations.

The statute 9 *Geo.* 4, c. 14, then goes on to say—"That, in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear at the trial, or otherwise, that the plaintiff, though barred by either of the said recited acts (a), or this act, as to one or more of such joint contractors, or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise, judgment

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(a) 21 Jac. 1, c. 16, and the *Irish* statute 10 Car. 1, sess. 2, c. 6.

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may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff." Now, it is urged, on the part of the defendant, that we are bound to give to the words "or otherwise," a construction that would operate to take this case out of the statute of limitations—or, in other terms, that these words were intended to embrace "payment of interest." But, we are not bound to find a meaning for the word "otherwise." Besides, the sense of the clause would be satisfied by supposing this word to apply to payment of money into Court, or to an indorsement of the note within six years.

Upon the broad construction of the act, therefore, I am of opinion that a part payment or payment of interest by one of several joint contractors is excepted out of the enactment, such payment not being within the mischief thereby intended to be remedied.

Mr. Justice PARK.—I have always considered the case of *Whitcomb v. Whiting* to be a governing case in *Westminster-Hall*, notwithstanding what has been thrown out against it by two learned persons. It was relied on in the Court of *King's Bench*, in the case of *Burleigh v. Stott*, where it was held that a payment of interest by *A.*, on the joint and several note of *A.* and *B.*, was evidence of a promise by *B.*, and took the case out of the statute, though *B.*, was a mere surety, and the payment was made without his knowledge; and also in this Court, in the case of *Perham v. Raynall*, under similar circumstances. These cases are expressly in point. The late statute having made a distinction, in the case of two or more joint contractors, between a written acknowledgment or promise, and a payment of a part of the principal, or of interest, by one of such joint contractors, it seems to me that such payment was intended by the legislature to be exempted from the

operation of the enactment; and therefore that the law in this respect stands as it was before the passing of the act.

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Mr. Justice GASELEE.—I am of the same opinion. The words—"Provided always that nothing herein contained shall alter, or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever"—coming immediately after the enactment—"That, where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor, or administrator shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them"—is to me a convincing argument that the statute intended to make a difference between the case of a promise and a payment of principal or interest by one of two or more such joint contractors.

Mr. Justice ALDERSON.—I am of the same opinion. According to the case of *Burleigh v. Stott*, it was clear law, before the passing of the act in question, that a part payment or a payment of interest by one created a liability on the part of all the joint contractors. If after the act such payment were held only to fix the party actually making it, that would in fact lessen the effect of a payment; whereas the statute expressly provides that "nothing therein contained shall alter, or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever." The statute had two objects—first, to require that an acknowledgment of a debt or promise of payment relied on to take a case out of the statute of limitations, shall be in writing, and signed by the party chargeable thereby—secondly, in the case of two or more joint contractors, to restrict such acknowledgment or promise to

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HODGSON.

the party actually making it. The only use of the proviso is, to make more extensive the effect of a part payment or payment of interest.

Rule discharged.

Wednesday,
April, 18th.

CHARLTON v. BURFITT.

The jury process must be sent to the sheriff, in the case of common jurors, *ten* days, and, in the case of *special* jurors, *three* days at the least before the *commission day*, at the Assizes.

The Court refused to open a rule that had been made absolute without cause shewn, upon an affidavit by the attorney alleging that he had understood the rule to be absolute in the first instance.

MR. Serjeant *Wilde*, in the course of the last term, on the part of the defendant, obtained a rule calling on the plaintiff or his attorney to shew cause why they or one of them should not pay costs to the defendant for not proceeding to trial at the last *Summer* Assizes. No cause being shewn, the rule was afterwards made absolute. It appeared that the cause had been set down as a special jury cause, but that the record had been withdrawn in consequence of the jury process having been sent to the sheriff too late to enable him to summon the jurors.

A summons was taken out in the last vacation to stay the taxation of costs upon this rule, on which occasion Mr. Justice *Park* allowed the taxation to proceed, but directed that all further proceedings should be stayed until after the expiration of the first four days of the present term, in order to give the plaintiff an opportunity to apply to the Court.

Mr. Serjeant *Merewether* accordingly now applied to open the rule.—He produced an affidavit wherein the plaintiff's attorney swore that he understood the rule to be absolute in the first instance, otherwise he should have been prepared to resist it.

Lord Chief Justice TINDAL.—I think the plaintiff is out of Court upon both grounds. He has not shewn to my

mind any sufficient reason to induce the Court to deviate from the ordinary practice in order to favour him. It requires something much stronger than a mere mistake or misapprehension of the party, to open a rule that has been made absolute. Then, as to the merits, it is to be observed that the rule was made absolute, not *pro defectu juratorum*, but through the *laches* of the plaintiff himself, in not causing the *distringas* to be issued in time to enable the sheriff to summon the jurors.

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CHARLTON
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Mr. Justice PARK.—I am of the same opinion. The case admits of no doubt. Judges are constantly prevented from trying causes at the Assizes solely in consequence of the irregularity of the parties in issuing the jury process too late.

Mr. Justice GASELEE.—The *distringas* in this case should have been delivered to the sheriff three days before the commission day. The neglect in matters of this kind is intolerable. I have seldom been able to fine a jurymen for non-attendance, on account of the summons not having been served the number of days required by the statute (a).

Mr. Justice ALDERSON concurred.

The learned Serjeant took nothing.

(a) See the statute 6 Geo. 4, c. 50, s. 25, which enacts "That the summons of every man to serve on juries, not being special juries, in any of the Courts aforesaid (*viz.* any of the King's Courts of record at *Westminster*, the superior Courts, both civil and criminal, of the three counties palatine, and all Courts of Assize, *Nisi Prius*,

oyer and terminer, and gaol delivery, and Courts of Sessions of the Peace in *England*), shall be made by the proper officer, *ten* days at the least before the day on which the juror is to attend, by shewing to the man to be summoned, or, in case he shall be absent from the usual place of his abode, by leaving with some

1832.

Thursday,
April 19th.

NELSON v. CHERRILL and Another, Assignees of LLOYD,
a Bankrupt.

A second commission of bankruptcy, pending a first, is void, and no rights pass to the assignees under it.

In trespass for seizing goods in the possession and apparent ownership of the plaintiff, the defendant cannot set up the title of a third person, to defeat the action.

THIS was an action of trespass brought to recover the value of certain goods of the plaintiff which had been seized by the defendants in the assumed character of assignees of one *Lloyd*, a bankrupt.

The cause was tried before Lord Chief Justice *Tindal*, at the Sittings at *Westminster* after last term. It appeared that the goods in question had originally belonged to *Lloyd*; and that the plaintiff claimed them by virtue of a bill of sale. In answer to the claim of the defendants as assignees of *Lloyd*, the plaintiff gave in evidence, that a prior commission had been sued out against *Lloyd* in the year 1831, by the name of *Levi*; that one *Cuttill* had been appointed assignee under that commission; and that *Levi* had never obtained his certificate. It was therefore contended that the second commission was void. For the defendants, it was contended that the property in the goods, if not vested in them, was vested in the assignee under the first commission.

A verdict was taken for the plaintiff for 200*l*, the value of the goods.

Mr. Serjeant *Andrews*, on the part of the defendants, now moved for a rule *nisi* that this verdict might be set aside, and a nonsuit entered, or a new trial had.—He submitted that, if the second commission were void, and the

person there inhabiting, a note in writing, under the hand of the sheriff or other proper officer, containing the substance of such summons; and the summons of every man to serve on special ju-

ries in any of the Courts aforesaid, shall be made by the like persons, and in the like manner as aforesaid, three days at the least before the day on which the special juror is to attend."

property in the goods in the assignee under the former commission, no action could be maintained in respect of them by the present plaintiff.

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NELSON,
v.
CHERRILL.

Lord Chief Justice TINDAL.—It appears to me that, so long as the decisions in the Court of *King's Bench* and in this Court remain upon the books, a second commission, pending a first, is void in point of law. I am therefore of opinion that the second commission in this case conferred no rights upon these defendants, and consequently that the plaintiff was entitled to recover. It seems that the plaintiff was in the actual possession, and had the apparent right to these goods; and that the defendants seized them under a supposed authority vested in them by virtue of the second commission. That commission being void, they have taken the goods without any authority. The only question then is, whether the defendants can be permitted to set up the rights of a third person, in order to defeat the action. I think that would be admitting a trespasser to clothe himself with rights which the law does not allow him. I am therefore of opinion that no rule should be granted.

The rest of the Court concurring—

Rule refused.

1832.

Thursday,
April 19th.

PALMER v. MARSHALL (a).

On the 28th of January the defendant insured a yacht of the plaintiff, in the usual terms, at and from Bristol to London. The yacht did not sail from Bristol till the 17th of May. In an action for a total loss, the vessel having been run down in the course of her voyage:—*Held*, that this delay in the sailing of the yacht, unaccounted for by the plaintiff, was such an unreasonable delay as to avoid the policy; the risk of the assurer being thereby materially increased.

THIS was an action on a policy of insurance for 1500*l.*, effected on the 28th January, 1831, on the yacht *Ruby*, at and from *Bristol to London*.

At the trial before Mr. Justice *Park*, at the last Assizes for *Dorset*, it appeared, that, at the time the policy was effected, the *Ruby* was lying in the float at *Bristol*, where she remained till the 17th May following, when she sailed for the port of *London*, and four days afterwards was run down by another vessel off the *Start*, and totally lost.

The learned Judge stated that he should leave the case to the jury with a strong intimation of opinion that the delay in the sailing of the vessel was unreasonable, and consequently that the defendant was entitled to a verdict: whereupon the plaintiff's counsel elected to be nonsuited.

Mr. Serjeant *Bompas* now moved for a rule *nisi* that this nonsuit might be set aside and a new trial had.—The facts were such as would have warranted the jury in finding a verdict for the plaintiff. In order to make a delay in sailing a deviation, it must be unreasonable; and that is a question for the jury: the material fact to be ascertained is, whether the risk has been increased. In *Langhorn v. Allnutt* (b), under a liberty to touch and stay at all ports for all purposes whatsoever, the policy not limiting the time of stay, whether a ship has stayed an unreasonable time for the purpose was held to be a question for the jury. In *Raine v. Bell* (c), where a ship was compelled in the course of her voyage to enter a port for the purpose of obtaining a necessary stock of provisions, which she could not procure before in the usual course, by rea-

(a) Reported on a former trial,
ante, p. 161; S. C. 8 Bing. 79.

(b) 4 Taunt. 511.
(c) 9 East, 195.

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MARSHALL.

son of a scarcity at her lading ports; and, during her justifiable stay in the port so entered for that purpose, she took on board bullion on freight, which the jury found did not occasion any delay in the voyage—it was held not to avoid the policy. In *Hull v. Cooper* (a), it was held, that, if a ship be insured at and from a certain place, where in fact she was not at the time, but arrived there after some interval (but the fact was not communicated to the underwriters, who did not call for information on the subject), it was a question for the jury whether the delay which intervened materially varied the risk. In *Mount v. Larkins* (b) the finding of the jury was—"That there was unreasonable and unjustifiable delay between the making of the said policy of assurance and the commencement of the risk intended to be insured against." Lord Chief Justice *Tindal*, in delivering the judgment of the Court in that case, said (c): "Upon this special verdict, it has been argued before us, on the part of the defendant, that the unreasonable and unjustifiable delay on the part of the captain in completing the outward voyage, on which he was then engaged, and commencing the homeward voyage on which the risk was intended to attach, discharged the underwriters from this policy: and we are of opinion that such *unreasonable and unjustifiable* delay on the part of the insured in commencing the voyage insured against, is in the nature of a deviation, and does amount to such an alteration of the risk insured against as to discharge the liability of the underwriters upon this policy."—"The reason upon which a deviation discharges the insurer is, not that the risk is thereby increased, but because the insured has, without necessity, substituted another voyage for that which was insured, and thereby varied the risk which the underwriter took upon himself." (d). In the present case,

(a) 14 East, 479.

(c) *Ante*, p. 178.(b) *Ante*, p. 165; S. C. 8 Bing.(d) *Ante*, p. 180.

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PALMER
v.
MARSHALL.

one question to be taken into consideration is, the nature of the vessel insured—a pleasure yacht—a description of vessel which it is well known to be the usual course to lay up for the winter.

Lord Chief Justice TINDAL.—The plaintiff in this case effected an insurance upon the yacht *Ruby* at and from *Bristol to London*. The policy was dated the 28th *January*, 1831, and the vessel remained in the dock or float at *Bristol* until the 17th of *May*. She then sailed on her voyage, and was lost. This action is brought to recover from the assurers the amount insured. It appears to me that this policy, on the part of the assured, implies that the voyage was in the immediate contemplation of the parties. The question is, whether, the voyage not taking place until so long a period as nearly four months from the time of insuring, we must not hold that there has been such an unreasonable delay as will avoid the policy, unless accounted for by the party setting up the policy. I have no hesitation in saying, that, if the delay were properly accounted for, the assured might still recover. I take it as if the case had been left to the jury with a strong intimation on the part of the learned Judge who tried the cause, that the delay in the sailing of the vessel had been unreasonable. The question for us now to consider is, whether this delay has been reasonably accounted for. As to this point the only fact suggested is, that the vessel in question is described in the policy as a yacht, and that it must be assumed to be in the knowledge of the assurers that vessels of that description are not used to sail in the winter months. If that were so, the plaintiff should not have allowed the policy to be framed in such general terms. He might have insured his vessel for a definite period, “in port or at sea,” as is the constant practice where the time of sailing is uncertain. But, upon the face of this policy, the contract implies that the vessel is to sail within a reasonable time.

The risk of the insurer, as described in the policy, is, as it seems to me, very materially varied. All that he insured against was at most a short period before the voyage, and an ordinary voyage from *Bristol* to the port of *London*. The plaintiff has imposed upon him an intermediate risk during the stay of the vessel at *Bristol*.

Under these circumstances, where the delay has been so great as in the mind of any reasonable person to clothe it with the character of unreasonable, the burthen is cast upon the plaintiff to shew that it is not so; and I think the direction of the Judge to that effect, in however strong words, would be justified.

Mr. Justice PARK.—The policy in this case was effected upon the *Ruby* yacht, at and from *Bristol* to *London*. What does that mean? When does the risk attach? Undoubtedly at *Bristol*. If the vessel be ready for sea, the risk can only commence from the date of the policy. This is not like the case of a ship that is known to the underwriter to be under repair at the time of effecting the insurance. It has been contended, that, as this vessel was described as a yacht—a vessel of pleasure—it must have been understood by all parties that she would not sail until the summer time. But I do not think that that circumstance creates any exception in this case in favour of the plaintiff. Then, as to the delay—if, as in *Mount v. Larkins*, the policy had not attached, and there had been delay, it might then have been a question whether such delay would have the effect of avoiding the policy. But, where the policy has attached, and the risk of the insurer commenced, the onus of proving the reasonableness of the delay in the vessel's sailing is thrown upon the assured. I therefore concur with my Lord Chief Justice in thinking that no rule ought to be granted in this case; the more especially that there is a sort of policy that might have covered this risk.

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FALMER
v.
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1832.

PALMER

MARSHALL.

At the trial I said that I should leave the case to the jury with a strong intimation of opinion that the delay had been unreasonable, and consequently that the defendant was entitled to a verdict; upon this my brother *Bompas* elected to be nonsuited: I therefore take the case to stand in precisely the same position as if the jury had returned a verdict for the defendant.

Mr. Justice GASELEE.—I am of the same opinion. The case might have been different had the ship been laid up in safety: but such was not the fact.

Mr. Justice ALDERSON.—It seems to me that a delay, to be excusable, must be a delay necessarily incurred for the purposes of the voyage. Here, the vessel was complete and ready for sea at the time of effecting the policy; and the delay, which was very considerable, has not been accounted for. In the case of *Langhorn v. Allnutt*, the delay was occasioned by the vessel's staying at *Carlsham* for the purposes of the voyage—to procure simulated papers. In *Raine v. Bell* there was no delay at all; the going into port for necessary provisions was not a deviation. The observations of Mr. Justice *Le Blanc* in that case must be taken with reference to the existing state of facts. Here, however, another risk has been substituted for that originally contemplated by the policy, and one of a totally different character.

Rule refused

1832.

HAYWARD and Others v. SEAWARD and Another.

Thursday,
April 19th.

THIS was an action of trover to recover the value of a steam boiler and apparatus detained by the defendants under the following circumstances:—

The defendants had in their possession a boiler belonging to the plaintiffs. The plaintiffs demanded it, and the defendants at first refused to restore it; but afterwards, and before the issuing of the writ, tendered it:—*Held*, no conversion.

The plaintiffs were owners of the *Royal George*, steam vessel. The defendants were engineers at *Limehouse*. In the month of *October*, 1830, the boiler in question being out of repair, the vessel was brought alongside the defendants' wharf, and the boiler unshipped for the purpose of repair. The owners of the *Royal George*, however, having determined to substitute a new boiler, no repairs were done. Shortly afterwards the plaintiffs sent a barge to the defendants' wharf for the old boiler, which the latter refused to re-deliver, unless paid a sum of 55*l.* 5*s.*, for landing, cleaning, and re-shipping it on board the barge. The plaintiffs tendered 23*l.* 2*s.*, and demanded the boiler. The defendants refused to accept the sum tendered, or to restore the boiler. On the 12th *November*, 1830, the following letter was sent by the plaintiffs' attorney to the defendants:—

"Gentlemen,—On behalf of the owners of the *Royal George* steam vessel, I am instructed to commence an action against you for your illegal detention of the boiler and other things belonging to that vessel. The sum of 23*l.* 2*s.* has been offered to you, and is still ready to be paid you on your reshipping the boiler, &c.; which is more than you can justly claim. This you have refused, and you refused to deliver up the boiler, &c., unless a demand of 55*l.* 5*s.* is paid. This sum is considered exorbitant. Most of the things are necessary for the vessel, and must be immediately supplied. I request to be favored with the name of your attorney, to whom I shall send process in the event of this matter not being immediately settled."

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HAYWARD

v.

SEAWARD.

This letter was on the following day answered by the defendants' attorney as follows:—

"Sir,—I am directed by Messrs. *Seaward* to inform you that they consider the demand made by them on the owners of the *Royal George* steam vessel fair and reasonable, and such as ought under all circumstances to be paid on reshipping the boiler. To avoid any inconvenience to your clients by not having the boiler, Messrs. *Seaward & Co.* request me to inform you that you may at any time take away the boiler, and any other articles belonging to your clients; and they will resort to an action to recover what is due to them. If after this notice the boiler remains on the premises, they will require rent for the same."

On the same day, a writ was issued against the defendants; and on the 15th, the plaintiffs' attorney wrote to the defendants' attorney as follows:—

"Your letter of the 13th instant is unsatisfactory; and, if a compromise is to take place, it must not be on the terms you mention. My clients expect that the defendants will pay for the boiler and apparatus so unjustly detained, or that a more equitable offer shall be made."

The cause was tried before Lord Chief Justice *Tindal*, at the Sittings at *Guildhall* after last *Hilary* Term. Witnesses were called on the part of the plaintiff to prove the foregoing facts, and also to prove that the sum of *£231. 2s.* was more than an adequate compensation for what had been done by the defendants. His Lordship, however, told the jury that the plaintiffs were not entitled to recover after the offer of the defendants, by their letter of the 13th *November*, to give up the boiler. The jury accordingly returned a verdict for the defendants.

Mr. Serjeant *Jones*, on the part of the plaintiffs, now moved for a rule *nisi* that this verdict might be set aside, and a new trial had, on the ground of misdirection.—He submitted that the refusal of the defendants to restore the boiler upon the demand made by the plaintiffs, amounted to a conversion, which could not be purged by any subsequent act of the parties; and that the letter subsequently written by the plaintiffs' attorney did not amount to a waiver of the right of action vested in him by the act of conversion.

1832.

HAYWARD
v.
SEAWARD.

Lord Chief Justice TINDAL.—A demand and refusal are evidence only, not conclusive of the fact of conversion. The question here is, whether the plaintiffs ought to have brought their action after the letter of the defendants' attorney, dated the 13th *November*. In that letter their attorney says—"To avoid any inconvenience to your clients by not having the boiler, Messrs. *Seaward & Co.* request me to inform you that you may at any time take away the boiler, and any other articles belonging to your clients; and they will resort to an action to recover what is due to them." After that, it seems to me to be impossible to say that there has been any conversion. The jury could not have found any other verdict. I therefore think no rule should be granted.

Mr. Justice PARK and Mr. Justice GASELEE concurred.

Mr. Justice ALDERSON.—A demand and refusal are only evidence of a conversion. The refusal in this case was cured by the offer subsequently made, but before the issuing of the writ, to restore the boiler.

Rule refused.

1832.

Thursday,
April 19th.

KEY and Another, Assignees of SHERWIN, a Bankrupt,
v. SHAW.

To substantiate an act of bankruptcy against a trader, evidence was given of his having caused himself to be denied to creditors, when he was at the same time seen concealing himself in a retired part of his shop.

The Judge told the jury, that, if the bankrupt had kept his house, or had wilfully secluded himself for the purpose of avoiding his creditors, or had removed himself from that part of the house where he had been accustomed to be found, to a more retired part, where he could not so readily be seen by his creditors, with intent to avoid them, he thereby committed an act of bankruptcy:—*Held*, that this direction was proper.

The mere failure to keep an appointment made with a creditor is not an act of bankruptcy.

THIS was an action of *assumpsit* for the use and occupation of a close in *Derbyshire*, which had come to the bankrupt since his bankruptcy, by descent, from his uncle.

The cause was tried before Mr. Justice *Bosanquet*, at the Sittings at *Westminster*, after the last term, when, after evidence had been given to shew the distress and difficulties of *Sherwin* previously to his supposed bankruptcy, a witness of the name of *Church*, a creditor of *Sherwin*, was called, to prove that he had applied to him many times for payment of his debt without success, and that he had, personally and by writing, made several appointments to meet him, but that he avoided him. Other witnesses proved that, on occasions when they called on *Sherwin* for money, he was denied by his wife; and on two of these occasions he had been seen by the witnesses, once retiring into a room at the back of the shop, and another time looking over Mrs. *Sherwin's* shoulder.

The learned Judge told the jury, that, if *Sherwin* had kept his house, or had wilfully secluded himself for the purpose of avoiding his creditors generally, or any one creditor in particular, or had removed himself from that part of the house where he had been accustomed to be found, to a more retired part, where he could not so readily be seen by his creditors, with intent to avoid them, he thereby committed an act of bankruptcy; and in that case the verdict must be for the plaintiffs; otherwise for the defendant.

The jury having returned a verdict for the defendant—

Mr. Serjeant *Taddy* now moved that this verdict might be set aside and a new trial had, on the grounds of misdirection, and that the verdict was against evidence.—The

direction of the learned Judge rather tended to mislead the jury. His Lordship did not state the law largely enough. It was not contended on the part of the plaintiffs that the bankrupt had secluded himself; but that, seeing creditors approach, he drew back to avoid them. If a man by any act evinces an attempt to defeat or delay his creditors, whether it be by absenting himself from or keeping his house, he thereby commits an act of bankruptcy. In *Dudley v. Vaughan*, Lord *Ellenborough* said (a): "If a trader shut himself up in his house, debarring all access to him, whereby his creditors are delayed, an act of bankruptcy is established by proof of his having done so. And, generally, if a trader seclude himself in his house to avoid the fair importunity of his creditors, who are thus deprived of the means of communicating with him, *he begins to keep house* within the meaning of the legislature, and commits an act of bankruptcy." There are cases, too, where it has been held, that the failure to keep an appointment with a creditor, for the purpose of delay, is an act of bankruptcy. Thus, in *Gillingham v. Laing* (b), where a news-vender, who frequented the *Royal Exchange* for the purpose of collecting intelligence for a newspaper, appointed a creditor to meet him there, and afterwards told a friend, if the creditor inquired there for him, to say he was not there, it was held that this was an absenting himself within the statute 1 Jac. 1, c. 15, s. 2, and an act of bankruptcy. Lord Chief Justice *Gibbs* there said (c): "I cannot think, that, by 'departing from his or her dwelling-house,' the statute means the same thing as by 'absenting himself,' or means to confine the generality of the former words to the particularity of the latter."

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(a) 1 Camp. 272.

236.

(b) 6 Taunt. 532; *S. C. nomine Gillingham v. Laing*, 2 Marsh.

(c) 6 Taunt. 537.

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Lord Chief Justice TINDAL.—I am of opinion that the rule prayed ought not to be granted. The grounds upon which it is moved for are—*first*, that the learned Judge who presided at the trial did not in his summing up accurately point the attention of the jury to that particular class of acts of bankruptcy to which it is contended the evidence applied—*secondly*, that the verdict is against evidence.

The question left to the jury was, whether *Sherwin* had wilfully secluded himself from a creditor. If even it had stopped there, I do not see how the direction could be misconstrued. I cannot conceive that the term “wilfully secluding” is so confined in its signification that the jury might not apply it to that sort of concealment spoken of by the witnesses. The learned Judge did not, however, so confine himself: he added words explanatory of what he meant by wilfully secluding himself; he said, that, if the party removed himself from that part of the house where he had been usually found, to a more retired part, where he could not so readily be seen by his creditors, with intent to avoid them, he thereby committed an act of bankruptcy. On the ground of misdirection, therefore, I think there is no ground for the motion for a new trial.

With regard to the second ground, I can only repeat what has often been said before, that, where the case has been properly left to the jury, and the question one of fact only, although we might think that we should, if on the jury, have arrived at a different conclusion, still that is not sufficient to warrant us in sending the cause down for a rehearing. It would be trespassing upon the province of the jury. It is impossible for us to say how far the jury may have given credit to the plaintiffs' witnesses. Their attention was properly called to all the points necessary for their consideration, and therefore we ought not, under the circumstances, to disturb their verdict.

Mr. Justice PARK.—I am of the same opinion. I see no possible objection to the mode in which the case was left to the jury. It was left as favourably for the plaintiff as its circumstances would permit. The general rule of law was accurately stated by the learned Judge. There was one point urged in argument to which I do not accede, *viz.* that a failure to keep an appointment made with a creditor constitutes an act of bankruptcy. In *Tolman v. Jones* (a) it was expressly held that merely appointing to meet a creditor at a given place, and failing to do so, is not an act of bankruptcy. Lord Chief Justice Best there said (b): “The intent to delay a creditor (which is proof of fraud or insolvency) is the essence of the act of bankruptcy which this person is supposed to have committed. There was not even *prima facie* evidence of such an intent. It was only proved that he made an appointment with a creditor to meet him, and that he did not keep that appointment. If a jury could, without more evidence, presume that he broke his engagement to delay his creditor, there are very few in the commercial world that could be assured they were not bankrupts.”

Mr. Justice GABELEE and Mr. Justice BOSANQUET concurring—

Rule refused (c).

(a) 9 J. B. Moore, 24; S. C. 2 Bing. 2, *nomine Tucker v. Jones*.

(b) 9 J. B. Moore, 26.

(c) See *Fisher v. Boucher*, 10 Barn. & Cress. 704, where a trader, being under apprehension of arrest, gave directions to his ser-

vant to deny him in case A., a sheriff's officer, called; and it was held, that, the sheriff's officer not having called, this of itself was not any evidence of a beginning to keep house.

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The testator, after giving some small pecuniary legacies, devised as follows:

—"As to the rest of my estate, the two houses, one in *St. John's Lane*, and the other in *Togswell Court*, I give to my wife for her life, and, after her decease, that in *St. John's Lane* to my daughter, the other between my two sons, to be equally divided; As to the rest of my estate, of what nature soever, one third to my wife, and the rest to be divided equally among the three children." The testator left no real property except the two houses above-mentioned:—*Held*, that the daughter took a fee in the house in *St. John's Lane*.

GALL v. ESDAILE.

THIS was an action of *assumpsit*, brought to recover back the deposit paid by the plaintiff as purchaser at a public auction of a freehold messuage and premises in *St. John's Lane, West Smithfield*, in the county of *Middlesex*, and interest thereon; and also to recover the costs and damages sustained by the plaintiff by reason of the defendant's inability to establish a good title.

The cause was tried before Mr. Justice *Alderson*, at the sittings in *London* in last *Trinity Term*, when a verdict was entered for the plaintiff for 300*l.*, subject to the opinion of the Court upon the following case:—

"The declaration (of *Hilary Term*, 1 *Will. 4.*) states, *inter alia*, that, by the third condition of sale, the purchaser was to pay down immediately a deposit of 20*l. per cent.* in part of the purchase-money, and sign an agreement for payment of the remainder on or before the 30th day of *July* then instant, on having a good title; that, by the fourth condition of sale, the vendor was, within fourteen days from the day of sale, to deliver an abstract of his title; that, by the fifth condition of sale, the purchaser was to have a conveyance of the freehold at his own expense, on payment of the remainder of the purchase-money agreeably to the third condition, up to which time all outgoing would be cleared; but that, if any delay should arise in the completion of the purchase by the time specified, the purchaser should pay interest on the balance of his purchase-money at the rate of 5*l. per cent. per annum*; that the plaintiff at such sale became and was the purchaser of the said messuage and premises, upon and according to the conditions then and there produced, for the sum of 430*l.*, and paid the sum of 86*l.*, as a deposit of 20*l. per cent.*, in part payment of the said pur-

chase-money, and signed an agreement for payment of the remainder on or before the said 30th day of *July*, on having a good title as aforesaid; and that the plaintiff, from the said sale until the said 30th day of *July* then last, was ready and willing to perform the conditions of sale on his part, but that the defendant, although required, had neglected to make or procure to be made a good title to the said messuage and premises.

“ The defendant pleaded the general issue.

“ The sale took place on or about the 1st *July*, 1828, and the defendant delivered his abstract of title to the plaintiff, purporting to be an abstract of the title of the defendant to a messuage or tenement and premises situate in *St. John's Lane, West Smithfield*, in the county of *Middlesex*, therein stating (among other things), according to the fact, that *John Mayor*, citizen and lord of *London*, being then seised in fee simple of two freehold messuages or tenements and premises, with their appurtenances, one of the said messuages being situate in *St. John's Lane*, aforesaid, and the other in *Togwell Court, Charter-house Lane*, made his will, duly executed and attested, dated the 15th *July*, 1735, in the words following, that is to say:—

“ ‘ I, *John Mayor*, citizen and lord of *London*, being in health of body and of sound understanding and memory, do make and declare this my last will as followeth: First, I give my soul to God that gave it me, resting for the salvation thereof on the alone merits of Jesus Christ, my Redeemer; my body I commit to the grave, to be decently interred, at the discretion of my executors hereinafter named: and, as to such worldly estate as it hath pleased God to bless me withall, I give or dispose of as followeth—first, to my brother, *Joseph Mayor*, one pound one shilling, and to his wife, *Mary Mayor*, the same, to buy each of them a mourning ring; to my dear and loving

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mother the sum of five pounds: *As to the rest of my estate*, the two houses, one in *St. Joneses Lane*, and the other in *Togwell Court, Chatehous Lane*, I give to my loving wif, *Mary Mayor*, for her life, and, after her decease, that in *St. Joneses Lane* to my daughter, *Mary Mayor*, the other betweane my two sons, *John* and *Joseph Mayor*, to be equally divided: *As to the rest of my estate*, of what nature soever, one third to my wif, and the rest to be divided equally among the three children: And I do hereby make my dear wif and brother *Joseph Mayor* joint executors of this my last will, revoking all former wills by me at any time heretofore made, and declare this to be my only last will and testament.'

"The said *John Mayor* left no real property beyond that specifically stated in the will.

"*Mary Mayor*, the daughter, survived the testator, and also her mother, and her interest in the said premises in *St. John's Lane* (which were the premises purchased by the plaintiff) was at the time of the sale vested in the defendant.

"On the receipt of the said abstract of title, the plaintiff objected to the title, on the ground that *Mary Mayor*, the daughter, took a life interest only in the house in *St. John's Lane*, under the specific devise in the will of the said *John Mayor*, her father, and the remainder in fee in one third part of two third shares thereof under the residuary disposition contained in the will; so that the title to the remainder in fee of the one third share of the testator's widow, and of the two third parts of two third shares devised to the testator's two sons, remained to be deduced from the widow and the sons.

"The defendant not concurring in this view taken by the plaintiff, but insisting that *Mary Mayor* took a fee in the entirety of the premises, after the death of her mother, and the plaintiff refusing to complete his purchase,

the defendant did, in *Michaelmas* Term, 1828, file a bill in equity against the above-named plaintiff, to compel a specific performance of the agreement for purchase of the said premises, and such bill was on the hearing dismissed with costs.

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“It was agreed by the plaintiff and defendant, that, if the will of *John Mayor* was insufficient to pass the fee in the entirety of the said premises to the said *Mary Mayor*, after the death of her said mother as aforesaid, the verdict ought to stand for the plaintiff for the said sum of 300*l.*; but otherwise the verdict ought to be entered for the defendant.”

The case came on for argument in the course of the last *Hilary* Term.

Mr. Serjeant *Scriven*, for the plaintiff.—The clear intent of the testator as apparent upon the face of the will was, to give to his daughter *Mary Mayor* an estate for life in the house in *St. John's Lane*. This proposition would have been unquestionable had the word *estate* not been used; and it is settled that that word will not of necessity carry a fee unless such be the manifest intention of the testator from the context of the will. *Whitelock v. Heddon* (a). In *Denn d. Moor v. Meller* (b), Lord *Kenyon* said: “In many of the cases that have been litigated, and in which it has been decided that the first devisee was only entitled to a life estate, one cannot but suspect, privately speaking, that it was the intention of the devisor to give the absolute property to the first taker; and Lord *Mansfield* used to observe, that the common class of men imagined that they could devise a fee simple by the same words that are sufficient to give a piece of plate; but the contrary of

(a) 1 Bos. & Pul. 247.

(b) 5 Term Rep 562.

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such a supposition has now been decided by so many authorities that it would be dangerous to shake them; and, in deciding on the construction of wills, we must not indulge in conjectures or wishes, but determine on the words used, according to those authorities." In *Chapman d. Oliver v. Brown*, Lord Mansfield said (a): "A Court of justice may construe a will, and, from what is expressed, necessarily *imply* an intent not particularly specified in words; but we cannot, from arbitrary conjecture, though founded upon the highest degree of probability, add to a will, or supply the omissions." In *Pettward v. Prescott* (b), the testator devised his "copyhold estate at P., consisting of three tenements, and now under lease, &c.," but did not specifically state for what interest; and it was held that an estate for life only passed. The Master of the Rolls (Sir William Grant) there said: "The words are not 'all my estate,' but 'my copyhold estate at Putney, consisting of three tenements, &c.:' that is, 'the estate I give you at Putney consists of three tenements;' which is the same thing as saying, 'three tenements compose the estate I give you:' a mere description of the thing, and not of his interest. That he meant to give the houses absolutely there is little doubt. So a testator generally does when giving under any description. But we must look at what he says; not at what he thought."

It may be said that the devise for life to *Mary Mayor* is inconsistent with the subsequent devise of the reversion in fee: but the cases of *Ridout v. Pain* (c), *Doe d. Briscoe v. Clarke* (d), and *Doe d. Moreton v. Fossick* (e), are express authorities to the contrary. In *Doe d. Briscoe v. Clarke*, the testator, after a general introductory clause "as to his worldly estate," devised to his wife during her

(a) 3 Burr. 1634.

(b) 7 Ves. 541.

(c) 3 Atk. 486.

(d) 2 New Rep. 343.

(e) 1 Barn. & Adolph. 186.

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natural life all his houses in *Swan Lane*; he then devised several houses, without words of inheritance, to his sons *T. B.* and *S. B.*, and, after the death of his wife, he gave to his son *W. B.* all those his three houses or tenements situate in *Swan Lane*, in the tenure or occupation of *A.*, *B.*, and *C.*; he likewise gave several legacies, to be paid within six months after his death; and concluded thus: "and I charge all my estates, both real and personal, with the payment of the above or aforementioned legacies, and I appoint my beloved wife and my son *T. B.*, my son *S. B.*, and my son *W. B.*, executors of this my will, and, after my just debts and funeral expenses are paid, then the surplus of my effects, both real and personal, to be equally divided to my executors which shall then be living: it was held that *W. B.* only took an estate for life under the devise of the three houses in *Swan Lane* after the death of his mother, notwithstanding the words of charge, &c.; but that he took a fee in one fourth part under the residuary clause. In *Doe d. Moreton v. Fos-sick*, Lord *Tenterden* says: "I take the general rule of construction to be, that all the testator has, which is not otherwise disposed of, passes under a residuary clause, unless there appear from other parts of the will, when the whole is read, a clear and manifest intention that something should not pass."

There being, therefore, a doubt upon the face of the will as to the title offered by the defendant, the plaintiff is entitled to recover. The case of *Curling v. Shuttleworth* (a) is precisely in point. There, the plaintiff was held entitled to recover back the deposit paid by him on the purchase of a policy of assurance, which was put up for sale under a power, the power of sale not being shewn to have been well executed. Lord Chief Justice *Tindal*

(a) 3 Moore & Payne, 368; S. C. 6 Bing. 121.

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said (a): "The rule is, that where, upon the sale of an estate, the title of the vendor is so questionable as to excite doubt or difficulty, or to render it probable that the right of the purchaser may become a matter of investigation in a Court of equity, a Court of common law will not compel the vendee to complete the purchase, as he cannot be obliged to accept or take a doubtful, or even an equitable title. The particulars of sale stated that the policies would be sold by order of the executors of a deceased mortgagee, *and under a power of sale*. It was, therefore, incumbent on the vendors to have shewn, not only a valid and subsisting power of sale, but that their right to sell was unquestionable and beyond all doubt. In this case there is such a reasonable degree of doubt as to render it more than probable that the right of the purchaser to demand the benefit he expected to derive under the policy might be disputed; and therefore we ought not to compel him to complete his purchase, or to accept a doubtful title."

Mr. Serjeant *Bompas*, *contrà*.—It is clear from the whole tenor of the will that the testator meant, after disposing of all his property by the second clause of his will to his wife for life, to give his daughter a fee in the house in *St. John's Lane*, and his other two houses to his two sons, as tenants in common; and the only question is, whether the words of the will are sufficient to carry this intention into effect. It is true, that, according to *Denn d. Moor v. Mellor*, and other authorities, the word "estate" does not necessarily carry a fee: but, in that case, Lord *Kenyon* says: "Where the word 'estate' has occurred, that word has been held, *ex vi termini*, to pass a fee." In *Andrew v. Southouse* (b), a devise of the testator's lands at *W.*, and

(a) 3 Moore & Payne, 381, 382.

(b) 5 Term Rep. 292.

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all his interest in the estates of *F. C.* deceased, to *L. A.* for life, and, after *L. A.*'s decease, to *E. S.*, charged with an annuity to *F. T.* for life, was held to give a remainder in fee to *E. S.* Lord *Kenyon* there said: "For nearly half a century it has been the wish of the Courts to give effect to the intention of the devisor as far as they can. It has frequently been observed, that, in almost every case where the words of the devise have been so restrained as to give only an estate for life, the decision has been against what may be supposed to have been the private intention of the devisor; and Lord *Mansfield* often said that it appeared to him that persons in general, who made their own wills, thought that the same words were sufficient to pass an estate of inheritance that are used to convey a mere chattel interest." The word "estate," unless restrained by other words in the devise, gives a fee—*Holdfast* d. *Cowper* v. *Marten* (a)—*Roe* d. *Allport* v. *Bacon* (b)—*Roe* d. *Child* v. *Wright* (c), *Randall* v. *Tuchin* (d)—*Denn* d. *Richardson* v. *Hood* (e)—*Harding* v. *Gardner* (f). In *Holdford* d. *Cowper* v. *Marten*, it was held that the word "estate" of itself carries a fee; and that words of restraint must be added to make it carry a less estate. Mr. Justice *Buller* there said: "The word *estate* is the most general word that can be used. For, so far from its being necessary to add words of inheritance in order to make it pass a fee, words of restraint must be added in order to carry a less estate; for it is *genus generalissimum*." In *Roe* d. *Allport* v. *Bacon*, Lord *Ellenborough* said: "If we were called on to construe this will with the same critical precision that would be prescribed to a grammarian,

(a) 1 Term Rep. 411.

(b) 4 Mau. & Selw. 366.

(c) 7 East, 259.

(d) 6 Taunt. 410; S. C. 2 Marsh.

(e) 7 Taunt. 35; S. C. 2 Marsh. 359.

(f) 3 J. B. Moore, 565; S. C. 1 Brod. & Bing. 72.

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I should be much inclined to adopt the arguments of the learned counsel, because *the said estates* do seem in strictness to refer to the freehold lands, messuages, and tenements before devised, according to the rule, *verba relata inesse videntur*. But, in cases of this sort, unless the testator uses expressions of absolute restriction, it may in general be taken that he intends to dispose of the whole interest; and in furtherance of this intention Courts of justice have laid hold of the word *estate* as passing a fee, wherever it is not so connected with mere local description as to be cut down to a more restrained signification." The case of *Randall v. Tuchin* is almost in terms the same as the present. There, *A.* devised to his niece a number of tenements, describing particularly the situation, abutments, and the tenant of each; and then added, "all which said *estates*, being copyhold, and held of the manor of *K.*, I devise to my said niece for life, and then to her son *B.*:" it was held that *B.* took an estate in fee. In that case, Lord Chief Justice *Gibbs* said: "Formerly a narrower construction prevailed, and it was held, that, if the former words described locality, the word *estate* was not descriptive of the quantity of interest, but designated local position: but it is now held, that, though the word *estate* points at a certain house or parish where the estate is situate, yet it shall carry a fee, unless restrained by other parts of the will. It may be that the signification of the word *estate* may be restrained, but it lies on the party who seeks to narrow its construction, to shew by what expressions in the will it is restrained." In the present case, any other construction than that which will give the daughter an estate in fee in the house in *St. John's Lane* will render the devise unintelligible. The case of *Pettiward v. Prescott* may be considered as over-ruled. And *Cole v. Rawlinson* (a), is an authority to shew, that, if it be necessary

(a) 1 Salk. 234.

to carry into effect the intention of the testator, the Court will transpose the words of a will.

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Mr. Serjeant *Scriven*, in reply.—The word “estate” in this will is not connected with the subject-matter of the devise, so as to evidence any intention in the testator that it should carry a fee. To make the latter part of the will consistent, the word “estate” must be construed in a limited sense.

Cur. adv. vult.

Lord Chief Justice TINDAL.—The only question which the Court is called upon to decide in this case is, what was the intention of the testator, to be collected from the will. After the introductory words, and making certain pecuniary bequests, the testator, by an intermediate clause, devises as follows:—“As to the rest of my estate, the two houses, one in *St. Joneses Lane*, and the other in *Togwell Court, Chatehous Lane*, I give to my loving wif, *Mary Mayor*, for her life, and, after her decease, that in *St. Joneses Lane* to my daughter *Mary Mayor*; the other betweane my two sons, *John* and *Joseph Mayor*.” The only question is, whether, by this devise, the intention of the testator is apparent that his daughter should take an estate in fee in the house in *St. John's Lane*, or whether she took for life only. It appears to me to have been the intention of the testator that she should take an estate in fee. The introductory words of the devise are, “as to the rest of my *estate*.” Now, if the testator had stopped there, there is no doubt, and indeed it is admitted, that these words would have sufficed to carry a fee. The Courts have held in numerous instances, that the word “estate” will carry a fee; and that mere words of description of the estate devised will not restrain it to a life estate. That being the general rule, the question is whether there is on the present occasion sufficient to raise a

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doubt that the testator meant so to deal with his estate as to give his daughter the fee; or, whether in the devise in question he had parted with the word "estate," and taken up "houses" as something different. It appears to me that he was throughout dealing with the word "estate," because he had previously left the houses in question to his wife for life. If he had been dealing with houses only, the words of the devise *per se* would convey an estate for life only. It aids this construction, that the testator has left no other real property. The residuary clause—"as to the rest of my estate, of what nature soever, one third part to my wif, and the rest to be divided equally among the three children"—cannot be held to apply to real property; for, the case finds that the testator "left no real property beyond that *specifically* stated in the will."

Looking, therefore, at the whole of the will, it seems to me that no violence will be done to the words of it, but, on the contrary, that effect will be given to every part of it, by holding that the daughter, *Mary Mayor*, took under the devise in question an estate in fee in the house in *St. John's Lane*.

Mr. Justice PARK.—I am of the same opinion. It is admitted that the word "estate" will, unrestrained by subsequent words, carry a fee. It seems to me that the argument in this case derivable from the circumstance of the testator evidently understanding the difference between an estate for life, and an estate in fee, is unanswerable. The devise to the wife is limited to her life; but there are no words of limitation in the devise over to the children.

Mr. Justice GASELEE.—I see no reason to differ from the opinions pronounced by my Lord Chief Justice and my Brother *Park*. There can be no question as to the

intention of the testator to give to his daughter an estate in fee in the property in question.

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Mr. Justice ALDERSON.—The testator having, as stated in the case, no other real property than that specifically devised, and he having personal property to which the residuary clause might apply, the construction put upon the will by the rest of the Court seems to me to be the true one.

Judgment for the defendant.

UMBRAGIO OBICINI, Administrator of GREGORY MATTEI,
deceased, v. BLIGH.

Thursday,
April 26th.

THIS was an action of debt brought to recover a sum which the plaintiff claimed to be due to him upon a judgment of the *Vice-Admiralty* Court of the island of *Malta*.

The cause was tried before Lord Chief Justice *Tindal*, at the Sittings in *London* after last *Trinity* Term, when a verdict was found for the plaintiff for 299*l.*, subject to the opinion of the Court upon the following case:—

“The plaintiff is the administrator (under limited letters of administration) of *Gregory Mattei*, formerly of the island of *Malta*. The defendant is a captain in His Majesty’s Navy, and at the time the cause of action arose, commanded a ship of war called the *Glatton*.

“On the 5th of *January*, 1809, a *Sicilian* vessel, called *La Madonna della Lettera e Gesu Maria Guiseppe*,

An action will not lie in the Courts at *Westminster* upon a judgment of a foreign Court, unless it clearly appear by the transcript of the proceedings that the defendant was subject to the jurisdiction of the foreign Court, and that the judgment pronounced against him was final, and for a definite sum.

Semble, that a decree of a *Vice-Admiralty* Court, called an “interlocutory,” is in effect final; and that such a de-

creed, requiring a party to pay a certain sum, may be enforced in the Courts at *Westminster*.

Quere, whether a judgment obtained in a prize court by the agent of a foreign power, against a native of this country, can be enforced here by the *personal representative* of such agent?

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was captured by the *Glatton*, under Captain *Bligh*, and taken into *Malta*, when a claim was made for the said ship and cargo in the *Vice-Admiralty* Court at *Malta*; and it was upon the proceedings of that Court in that cause that the present action was brought.

In proof of those proceedings, the plaintiff produced a document, under the seal of the said Court, of which the following is a copy:—

“ *George* the Fourth, by the grace of God, of the United Kingdom of *Great Britain* and *Ireland* King, Defender of the Faith, To all and singular persons of whatsoever dignity, state, degree, or pre-eminence they be to whom these present letters testimonial shall come, greeting—We do by these presents make known and signify unto you, that, upon examining the records of our *Vice-Admiralty* Court of the island of *Malta*, and territories thereunto belonging, kept by one *John Locker*, Esq., the principal registrar of the said Court, we do find certain interlocutory decrees, instruments, and proceedings, had, made, and prosecuted in our said *Vice-Admiralty* Court, in a certain cause or business, intituled—*La Madonna della Lettera e Gesu Maria Guiseppe, Francesco Micali*, master, taken by his Majesty's ship of war *Glatton*, *George Miller Bligh*, commander, and brought to *Malta*, to the tenor and effect and at the times hereinafter expressed, to wit:—

“ ‘ On *Saturday*, the 25th of *February*, 1809, before the worshipful *John Sewell*, Doctor of Laws, Judge of the *Vice-Admiralty* Court of the island of *Malta*, and territories thereunto belonging, in the Court-room situate at *Strada Mercanti*, in the city of *La Valetta*, in the said island of *Malta*.

“ ‘ Present, *Wm. Stephens*, Dep. Reg.

“ ‘ *La Madonna della Lettera e Gesu Maria Guiseppe, Francesco Micali*, master, taken by his Majesty's ship of war *Glatton*, *George Miller Bligh*, Esq., commander, and brought to *Malta*. ” } On admission of the territorial claim for the ship and cargo.

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“ ‘ *Rousiere*, for *Fenton*, prayed the claim of territory for ship and cargo to be admitted, and the ship and cargo to be restored, with costs and damages.

“ ‘ *Jackson* prayed the cause to stand over until *Wednesday*, in order that the captor might translate certain letters of advice and invoices, to shew that part of the cargo did not belong to subjects of his *Sicilian* Majesty.

“ ‘ *Rouviere* objected thereto, and prayed the cause to be heard immediately; whereupon the Judge directed the cause to be heard this day, both proctors agreeing to take the papers as translated. The Judge then gave leave to *M. Mattei*, the agent of his *Sicilian* Majesty, to amend his claim if he thought proper; whereupon the Court was informed *M. Mattei* wished to hear the claim as it then stood: whereupon, the Judge, having heard the evidences and proofs read, and advocates and proctors on both sides thereon, admitted the claim for the ship and cargo, save the goods mentioned in bill of lading No. 19, pronounced the ship and cargo, saving as aforesaid, to belong as claimed; and, by *interlocutory*, decreed the same to be restored to the claimant for the use of the owners and proprietors thereof; and reserved the adjudication of goods in bill of lading No. 19, and the question of costs and damages, to whensoever; and, by further *interlocutory* decree, pronounced freight to be due on said goods—decree of unli-very of goods in bill of lading No. 19.

“ ‘ *Jackson* prayed a decree of inspection of said goods, which the Judge was pleased to reject.’

“ ‘ On *Saturday*, the 15th of *April*, 1809, before the worshipful *John Sewell*, Doctor of Laws,

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Judge of the *Vice-Admiralty* Court of the island of *Malta*, and territories thereunto belonging, in the Court-room, situate in *Strada Mercanti*, in the city of *La Valetta*, in the said island of *Malta*.

“ ‘ Present, *Wm. Stephens*, Dep. Reg.

<p>“ ‘ <i>La Madonna della Lettera e Geru Maria Guiseppo, Francesco Micali</i>, master, taken by his Majesty's ship of war <i>Glatton</i>, <i>George Miller Bligh</i>, Esq., commander, and brought to <i>Malta</i>.</p>	}	<p>On admission of the territorial claim as amended, and on the reserved question of costs and damages.</p>
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“ ‘ *Fenton* prayed the territorial claim in as much as amended to be admitted, and the remainder of the cargo to be restored, with costs and damages.

“ ‘ *Jackson* alleged that he did not object to the admission of said territorial claim as amended, but prayed the Judge to reject *Fenton's* petition for costs and damages.

“ ‘ The Judge, having heard the aforesaid claim and evidence and proofs read, at the petition of *Fenton*, on motion of counsel, and with consent of *Jackson*, admitted the aforesaid claim, pronounced the goods to belong as claimed, and by interlocutory decreed the same to be restored to the claimant for the use of the owners and proprietors thereof; and, having heard advocates and proctors on both sides, by further interlocutory decree, pronounced demurrage to be due from the day of the capture, *vis.* the 5th of *January*, to the 4th day of *March* last, as also interest on the value of the cargo for such period, and special damage if any can be shewn; but gave no costs: and further reserved the consideration of premium of insurance.’

“ ‘ On *Wednesday*, the 14th of *March*, 1810, before the worshipful *John Sewell*, Doctor of Laws, Judge of the *Vice-Admiralty* Court of the

island of *Malta*, and territories thereunto belonging, in the Court-room, situate in *Strada Mercanti*, in the city of *La Valetta*, in the said island of *Malta*.

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“ ‘ Present, *Wm. Stevens*, Dep. Reg.

“ ‘ *La Madonna della Lettera e*
Geru Maria Guiseppe, Francesco
Micali, master, taken by his Ma-
jesty's ship of war *Glatton*, *George*
Miller Bligh, Esq., commander,
and brought to *Malta*.

The Deputy Registrar's
report as to damages, is con-
firmed if not objected to by
this day.

“ ‘ The Judge was pleased to confirm said report of
damages—Present, *Allen* and *Jackson*.

“ ‘ *J. Locker*, Reg.’

“ ‘ On *Saturday*, the 10th of *October*, 1810,
before the worshipful *John Sewell*, Doctor of
Laws, Judge of the *Vice-Admiralty* Court of the
island of *Malta*, and territories thereunto belong-
ing, in the Court-room, situate in *Strada Mer-*
canti, in the city of *La Valetta*, in the said is-
land of *Malta*.

“ ‘ Present, *Wm. Stevens*, Dep. Reg.

“ ‘ *La Madonna della Lettera e*
Geru Maria Guiseppe, Francesco
Micali, master, taken by his Ma-
jesty's ship *Glatton*, *George Miller*
Bligh, Esq., commander, and
brought to *Malta*.

Fenton and *Allen* alleged,
that, on the 14th *March* last,
the registrar's and merchants'
report as to special damage
was confirmed, and that their client had made repeated ap-
plications to the captors' agent for the payment of the
amount of said special damages as confirmed, but that he
had not been able to obtain the same, and prayed the
Judge to decree a monition to issue forth against the said
captors and their agent, for the payment of such special
damages; and which the Judge decreed accordingly.

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“ ‘ **GEORGE** the Third, by the grace of God, of the United Kingdom of *Great Britain* and *Ireland* King, Defender of the Faith, to *John Chapman*, gentleman, Deputy Marshal of the *Vice-Admiralty* Court of the island of *Malta*, and the territories thereunto belonging, Greeting: Whereas the worshipful *John Sewell*, Doctor of Laws, Judge of the *Vice-Admiralty* Court of the island of *Malta* and the territories thereunto belonging, and also to hear and determine all and all manner of causes and complaints as to ships and goods seized and taken as prize specially constituted and appointed, rightly and duly proceeding in a certain cause or business of prize moved and prosecuted before him in our said Court on behalf of *George Miller Bligh*, Esq., commander of our ship of war *Glatton*, the captor of a certain vessel called *La Madonna della Lettera e Gesu Maria Guiseppe*, whereof *Francesco Micali* was master, against the said ship or vessel, her tackle, apparel, and furniture, and all and singular the goods, wares, and merchandizes laden therein, and also against *Gregory Mattei*, the claimant of the said ship and cargo, rightly and duly proceeding, on the 15th day of *April*, in the year of our Lord 1809, by his interlocutory decree, decreed certain goods to be restored to the said claimant for the use of the owners and proprietors thereof, and condemned the captors in certain demurrage, costs, and special damages sustained by the claimants: And whereas, on the 10th day of *October* instant, rightly and duly proceeding at the petition of the proctors for the said claimant, alleging that, on the 14th day of *March* last, the registrar's and merchants' report as to the said special damages and demurrage was confirmed, and that their clients had made repeated applications to the captor's agent for the payment of the amount of said special damages and demurrage as confirmed, but that they had not been able to obtain the same, hath decreed a monition to issue forth against the said *George Miller Bligh*, the captor of

the said ship and cargo, and *William Robertson*, the agent of the said captors, to pay to the said claimant the sum of 2991 scudi, 11 taris, and 11 grains, of *Malta* currency, being the amount of said special damages and demurrage as confirmed, besides the charges of this monition, and the execution thereof, within fifteen days after service (justice so requiring): We do, therefore, charge and strictly injoin and command you that you omit not by reason of any liberty or franchise, but that you monish or cause to be monished, peremptorily and personally, the said *George Miller Bligh*, commander of our ship of war *Glatton*, the captor of the above vessel and her cargo, and *William Robertson*, the agent of the said captor, to pay or cause to be paid to the said claimant or his proctors the sum of 2991 scudi, 11 taris, and 11 grains, being the amount of such special damages and demurrage, as confirmed as aforesaid, besides the charges of this monition, and the execution thereof, within fifteen days after service, under pain of the law, and the peril which will fall thereon; and that you duly certify us our aforesaid Judge, or his Surrogate, what you shall do in the premises, together with these presents. Given at *La Valetta*, in our aforesaid *Vice-Admiralty* Court, under the seal thereof, for causes, this 27th day of *October*, in the year of our Lord 1810, and of our reign the fifty-first.

“ ‘ *Wm. Stevens*, Dep. Reg.

“ ‘ Monition against captors and
agents, to pay special damage and
demurrage. }

“ ‘ *Fenton and Allen*, Proctors.

“ ‘ Indorsed

“ ‘ I, *John Chapman*, Deputy Marshal of the *Vice-Admiralty* Court of the island of *Malta*, and the territories thereunto belonging, do hereby certify that the within original monition was personally served on the within-men-

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tioned *William Robertson*, by shewing to him the within monition under seal, and by leaving with him a true copy thereof. And I do also certify that the aforesaid monition was not served on the within-mentioned *George Miller Bligh*, by reason of his having left this island some time ago; and that he has not at present returned to *Malta*. Witness my hand, this 8th day of *November*, 1810.

“ ‘ *John Chapman*, Dep. Marshal.

“ ‘ *Madonna della Lettera e Gesu Maria Guiseppe, Francesco Micali*, master, this fourteenth day of *November*, 1810. Appeared personally *John Chapman*, of the city of *La Valetta*, gentleman, Deputy Marshal of the *Vice-Admiralty Court* of the island of *Malta*, and the territories thereunto belonging, and made oath that the contents of the certificate indorsed on the back of the annexed monition, and to which he hath subscribed his name, were and are true.

“ ‘ *John Chapman*, Dep. Marshal.

“ ‘ Same day, sworn before }
me—

“ ‘ *Robert Forrest*.

“ ‘ On *Wednesday*, the 28th *November*, 1810, before the worshipful *John Sewell*, Doctor of Laws, Judge of the *Vice-Admiralty Court* of the island of *Malta*, and territories thereunto belonging, in the Court-room, situate in *Strada Mercanti*, in the city of *La Valetta*, in the said island of *Malta*.

“ ‘ Present, *Wm. Stevens*, Dep. Reg.

“ ‘ *La Madonna della Lettera e Gesu Maria Guiseppe, Francesco Micali*, master, taken by his Majesty's ship of war *Glatton*, *George Miller Bligh*, Esq., commander, and brought into *Malta*.

Fenton returned the monition duly executed, and prayed an attachment.

Jackson appeared for Mr. *William Robertson*, and alleged him not to be the agent

of his Majesty's ship *Glatton*, and that he was not in possession of any effects belonging to the said ship; and prayed him to be dismissed from all observance of justice in this matter.'

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" All and singular which premises, as they have been drawn up and passed in our aforesaid *Vice-Admiralty* Court, so we have thought fit that the same should be exemplified unto you; and we attest that the same do agree, having been faithfully compared, with their respective originals remaining on record in our Court aforesaid.

" In witness whereof, we have caused the seal of our aforesaid *Vice-Admiralty* Court to be hereunto affixed. Given at *La Valetta, Malta*, this eighth day of *May*, in the year of our Lord 1828, and of our reign the ninth.

" *J. Locker, Registrar.*"

" A witness who had practised for many years in the *Vice-Admiralty* Court at *Malta*, as a proctor, stated that the usual course of proceeding in prize cases was, that the ship's papers and affidavits were first brought in before a Surrogate; and that the ship's papers would disclose who were the owners. After which a monition was directed to be issued, calling upon all persons to appear and make known their claims. This monition was usually stuck up on 'Change. After such monition is returned, the claim is generally made; it is a claim, with an affidavit annexed in support of it. That claim and affidavit would shew in whose behalf and in what right the claim was made. The claim and affidavit in this case are not comprised in the document produced; this cause is taken up from the admission of the claim. The witness stated that he was not aware that there were any other proceedings in the progress of the cause than what appeared on the document

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produced; but that it did not contain a transcript of all the acts of Court: there were previous acts of Court, such as assigning a proctor for the captors, returning the monition, and the affidavit and claim: and he further stated that he thought the document contained the whole of the proceedings from the monition; and he said there would be no other formal adjudication beyond what was on the document produced. The monition set forth in the document produced is the last monition, and is served on the agent, if the party cannot be found, and there be an agent regularly appointed. After service of the last monition, an attachment might issue if the money was not paid; but an attachment does not issue without service of the last monition on the party, or an agent regularly appointed by him. Before the claim was put in, the captain's mate and principal officers were usually examined.

"The *Glatton* was paid off in *England* in the month of *October*, 1809.

"Some evidence was also given to shew that this judgment was still unsatisfied, and that point was left to the jury, who found for the plaintiff.

"It was agreed that either party should be at liberty to refer to the proceedings; and the question for the opinion of the Court was, whether the plaintiff was entitled to recover. If the Court should be of opinion that he was, the verdict to stand; otherwise a nonsuit to be entered."

The case now came on for argument. The objections urged to the maintenance of the action were—1. That it did not appear on the face of the transcript of the proceedings in the *Vice-Admiralty* Court at *Malta*, that the defendant had any notice of such proceedings—2. That the transcript itself was too imperfect for this Court to give judgment upon—3. That it did not appear that the proceedings in the *Vice-Admiralty* Court were final—4. That the transcript did not disclose in what right *Mattei* acted,

or that he had any interest in the subject-matter of the suit in respect of which the plaintiff, as his administrator, could support this action—5. That this proceeding involved a question of prize or no prize, over which the Court of *Admiralty* has by law exclusive jurisdiction.

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Mr. Serjeant *Wilde*, for the plaintiff.—1. The ship in question was captured by the defendant, and taken into *Malla*; and a suit for condemnation was instituted in the *Vice-Admiralty* Court there, which it was the duty of the defendant to institute. In the cases of *The William* (a), *The Huldah* (b), and *The Susannah* (c), it is distinctly laid down that it is the duty of the captor to carry his prize into the nearest port where an *Admiralty* Court is established, in order to procure her immediate condemnation. On the face of these proceedings it appears that the ship was taken by the defendant: he was therefore, in contemplation of law, the moving party; and the suit must be taken to have been instituted by him, inasmuch as he was bound to institute it: and the proctor who conducted it must be deemed to have appeared at his instance (d). This Court will presume that the *Vice-Admiralty* Court proceeded according to its duty, until the contrary be made appear; and will accredit the acts of that Court in treating the person appearing as appearing by the authority of the proper party to the suit. It is not to be presumed that that Court decreed the restoration of the ship without having heard the captor. The facts set forth and the evidence given of the course of practice in the *Vice-Admiralty* Court sufficiently connect the defendant with the suit there. In *Buchanan v. Rucker* (e) and *Cavan v. Stewart* (f) the defendants were held not to be bound by the judgments or

(a) 4 Rob. Adm. Rep. 214.

1 Dodson, 405.

(b) 3 Rob. Adm. Rep. 235.

(c) 1 Camp. 63; S. C. 9 East, 192.

(c) 6 Rob. Adm. Rep. 48.

(d) The case of *The Diligentia*,

(f) 1 Stark. N. P. C. 525.

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process of the inferior courts, because the mode of summoning adopted in those cases was insufficient: but, in *Douglas v. Forrest* (a), *assumpsit* was held to lie upon a decree obtained in the Court of *Session* in *Scotland* against a native of that country, although he had no notice whatever of the proceedings there.

2. Every adjudication of a Court of competent jurisdiction may be enforced in the Courts in *Westminster-Hall* (b). In *Henley v. Soper* (c) it was held that debt lies on a decree of a colonial court, made for payment of the balance due on a partnership account. Lord *Tenterden* there said (d): "There is a great difference between the decree of a colonial court and a Court of equity in this country. The colonial court cannot enforce its decrees here, a Court of equity in this country may; and, therefore, in the latter case there is no occasion for the interference of a Court of law, in the former there is, to prevent a failure of justice. There is another difference also: in considering the proceedings of a colonial court, we must look at the substance and not at the form, according to the rule adopted by the Privy Council. If we, sitting in *England*, were to require in the proceedings of foreign Courts all the accuracy for which we look in our own, hardly any of their judgments could stand." That case is a direct authority to shew that strict regularity is not to be required in the proceedings of colonial courts, and courts like that in question. In *Sadler v. Robins* (e), it was held that an action will lie upon a decree of the *Chancery* in *Jamaica* for the payment of a specific sum; and in *Molony v. Gibbons* (f), upon a judgment by *nil dicat* in the Supreme Court of Judicature of that island, without any proof that the defendant was with-

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| (a) 1 Moore & Payne, 663; S. C. 4 Bing. 686. | 2 Man. & Ryl. 153. |
| (b) <i>Walker v. Witter</i> , 1 Doug. 1, and the cases there cited. | (d) 8 Barn. & Cress. 19. |
| (c) 8 Barn. & Cress. 16; S. C. | (e) 1 Camp. 253. |
| | (f) 2 Camp. 502. |

in the jurisdiction of the Court. In *Hall v. Odber* (a), it was held that evidence of an account stated, whereby the defendant admitted a certain balance due to the plaintiff, was not done away with, but confirmed, in support of an *assumpsit*, by evidence of a foreign judgment recovered by the plaintiff for the same sum, with a stay of execution for six months, to enable the defendant to prove a counter demand, if he had any. There are many proceedings in this Court which would not necessarily appear upon the face of the record.

3. The judgment in the *Vice-Admiralty* Court is final in every respect. In *Oughton's Ordo Judiciorum* (b) is the following passage upon the subject of decrees of the nature of that under discussion: "*Illud dicitur decretum interlocutorium, habens vim sententiæ definitivæ, quando illud decretum est finale et non speratur alia sententia seu aliud decretum super illo articulo, re, vel causâ, sed per illud imponitur finis illi rei de quâ interlocutum est.*"

[Mr. Justice *Alderson*.—The decree in this case nowhere ascertains the amount to be paid under it.]

The monition refers to the judgment, and by that the defendant is required to pay 2991 scudi, 11 taris, and 11 grains, together with the charges of the monition and the execution thereof. To ascertain whether a foreign judgment is final or not, all that the Courts look to is, whether or not the sum adjudged by the foreign court to be paid by the defendant is ascertained and defined. Here, the judgment is definite as to its amount, and final in its object. The 28th section of the prize act, 33 *Geo. 3*, c. 66, expressly recognizes decrees such as the present to be final; it describes them as "interlocutory decrees having the force of a definitive sentence."

[Lord Chief Justice *Tindal*.—I think we may assume this to be a definitive sentence.]

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(a) 11 East, 118.

(b) Tit. 123, p. 194.

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Lord Chief Baron *Gilbert*, in his treatise on the action of debt (a), says: "The act of the law, that is, the judgments or acts of Courts of justice, may reduce men's acts of any sort to a certain value, whether they be acts of benefit or of injury and injustice. And when a certain value is set upon such action, it creates a debt to the party to whom it is by law appointed; for, though there be no actual contract, yet the debt arises *ex quasi contractu*; for, as it is common justice to repair injuries, so, when the law has settled the compensation of the injury, the law supposes a contract engaging the party to make a compensation. Besides, the law being the common rule to settle all disputes, when once the *quantum* of the damage or injury is adjusted by the decision of one of its Court, that decision or judgment ought in right reason to create a debt, as much as if the parties themselves had chosen arbitrators to determine between them, who had awarded a certain sum of money, which, as has been already observed, might be recovered by an action of debt." The law is similarly laid down by Mr. Justice *Blackstone* (b). He says: "Every person is bound and hath virtually agreed to pay such particular sums of money as are charged on him by the sentence, or assessed by the interpretation of the law. Whatever, therefore, the laws order any one to pay, that becomes instantly a debt, which he hath beforehand contracted to discharge. And this implied agreement it is that gives the plaintiff a right to institute a second action, founded merely on the general contract, in order to recover such damages or sum of money as are assessed by the jury and adjudged by the Court to be due from the defendant to the plaintiff in any former action. So that, if he hath once obtained a judgment against another for a certain sum, and neglects to take out execution thereupon, he may

(a) *Gilbert's Cases in Law and Equity*, 390.

(b) 3 Bl. Com. 158, 159.

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afterwards bring an action of debt upon this judgment, and shall not be put upon the proof of the original cause of action, but, upon shewing the judgment once obtained still in full force, and yet unsatisfied, the law immediately implies, that, by the original contract of society, the defendant hath contracted a debt, and is bound to pay it."

4. In *Malony v. Gibbons*, where an objection was taken to the authority of the attorney to appear, Lord *Ellenborough* said (a): "I will look to these foreign judgments with great jealousy; but I must give them credit for the facts which they specifically allege; and I must presume in the present case that the Court saw *Ferrier* properly constituted attorney for the defendant." Who is the proper person to prosecute a claim in a case like the present, is a question over which the *Vice-Admiralty* Court has exclusive jurisdiction—*Sinclair v. Fraser* (b); and *Mattei* was the person recognised by that Court: the defendant cannot therefore now object to his right to appear.

5. It may be admitted, that, if the question of prize or no prize was in any degree raised in this case, a Court of law could not interfere: but no such question can possibly arise here.

Mr. Serjeant *Stephen*, *contra*.—1. In *Buchanan v. Rucker*, it was expressly laid down that the law will not raise an *assumpsit* upon a judgment obtained by default in one of the colonies, against a party who, upon the face of the proceedings, appeared only to have been summoned by nailing up a copy of the declaration at the court-house door; it not appearing that he had ever been present in the colony, or subject to the jurisdiction of the colonial court at the time the suit commenced or afterwards; al-

(a) 2 Camp. 503.

Trials, Vol. 20, p. 468; S. C. 1

(b) Cited in *The Duchess of Kingston's case*, *Howell's State**Dong.* 5, n. 1.

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though by a law of the colony, if a defendant be absent from the island, and without an attorney, manager, or overseer there, such mode of summoning him shall be deemed a good service. And in *Cavan v. Stewart*, which was an action of *assumpsit* on a judgment of the Supreme Court of Judicature in *Jamaica*, Lord *Ellenborough* said (a): "It is perfectly clear, on every principle of justice, that you must either prove that the party was summoned, or at least that he was *once* on the island." The case of *Douglas v. Forrest* has been cited, to shew that it is not necessary that the party should be resident within the jurisdiction of the Court where the judgment which it is sought to enforce is pronounced. In delivering the judgment of the Court in that case, Lord Chief Justice *Best* says (b): "The reasoning of Lord *Ellenborough*, in the case of *Buchanan v. Rucker*, is in favour of these decrees. Speaking of a case decided by Lord *Kenyon*, his Lordship says (c) — 'In that case, the defendant had property in the island, and might be considered as virtually present.' The Court decided against the validity of the attachment, because it did not appear that the party attached was ever in the island, or had any property in it. In both these respects, that case is unlike the present. In the case of *Cavan v. Stewart*, Lord *Ellenborough* said — 'You must prove that the party was summoned, or at least that he was once on the island of *Jamaica*, where the attachment issued.' To be sure, if attachments, issued against persons who never were within the jurisdiction of the Courts issuing them, could be supported and enforced in the country in which the person attached resides, the legislature of any country might authorize their Courts to decree on the rights of the parties who owed no allegiance to the government of such country, and were under no obligation to attend its Courts, or obey its laws. We confine our judgment to a case

(a) 1 Stark. N. P. C. 529. (b) 1 Moore & Payne, 689. (c) 1 Camp. 66.

where the party owes allegiance to the country in which the judgments are given against him, from being born in it; and by the laws of which country his property was, at the time these judgments were given, protected; and where the debts were contracted in the country in which the judgments were given, whilst the debtor resided in it." The decision in that case, therefore, appears clearly to have been put upon the sole ground that the defendant owed allegiance to the country whose Court had adjudicated in the matter: whereas here, for any thing that appears, the defendant never was in the island of *Malta*, had no accredited agent there, and owed no allegiance in respect of which he was liable to be sued in the Courts there. It is no where shewn that *Jackson* appeared upon the authority of the defendant: and the monition was never served upon the defendant.

2. If there be any imperfection in the record of the proceedings of the foreign court, the plaintiff fails in making out his case. The transcript here is not in the usual form. It professes to be a transcript of "*certain* interlocutory decrees, instruments, and proceedings, had, made, and prosecuted" in the *Vice-Admiralty* Court; whereas, to enable this Court to judge of the propriety of the decision, *the whole* of the proceedings should be laid before it. Were such a mode of recording proceedings permitted, a variety of frauds might be committed; for instance, supposing the record to contain an entry of an appeal from the decision of the *Vice-Admiralty* Court, or an entry of satisfaction, what is to prevent the plaintiff from procuring a transcript excluding the entry of appeal or of satisfaction? This Court will not give greater effect to the acts of judicial functionaries abroad than may be collected from the face of the proceedings.

3. No action can be maintained on a sentence of an inferior court which is not final. *Emerson v. Lashley* (a)

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is the first reported decision upon the subject. It was there held that no action will lie in this Court to recover costs ordered to be paid by a *rule* of an inferior court in the course of a suit there, notwithstanding the defendant should not be liable to an attachment of the inferior court, by being resident out of its jurisdiction. Lord Chief Justice *Eyre* there said: "There is that sort of credit given to the *judgments* of a court of competent jurisdiction, that they create debts and duties upon which actions of debt are founded. General policy and convenience require that faith should be given to those judgments, and that duties should arise; but, as to the conduct, and all the steps belonging to the conduct of the *interlocutory proceedings*, they are fit to be regulated by the authority of the Court where they arise, but by no means fit to be the foundation of general duties creating moral obligations." In *Brown's Civil Law* (a), it is said that a sentence is interlocutory where a further sentence is to be expected—which was the case here. In *Carpenter v. Thornton* (b) it was held that no action at law can be maintained on a decree in equity for the payment of interest on purchase-money, and the costs of a bill for a specific performance. Mr. Justice *Bayley* there said: "The foundation of the suit in equity in this case seems to have been an equitable obligation on the part of the defendant to pay the money. This action, if it can be maintained at all, must be founded upon a legal obligation to pay. The decree in equity merely ascertains that the defendant is under an equitable obligation to pay; it does not go further, and shew that there is any legal obligation to pay." And Mr. Justice *Holroyd* said: "In the case of judgments of inferior courts and courts not of record, where the law implies a promise to pay, it is to pay a legal debt. Wherever there is a debt at law, the Court will presume that the party promises to do that which the law requires.

(a) Page 494, n.

(b) 3 Barn. & Ald. 52.

When the debt is founded upon equitable considerations alone, it may be enforced by the authority of the Court which ordered it to be paid. The law, in such a case, does not imply a promise. There is no instance of an action brought on a rule of Court for payment of money. The mode of enforcing such an order is by attachment for contempt in not obeying the order of the Court. Now, although that does not absolutely shew that such an action is not maintainable, yet, where no such action has ever been maintained, it lies on the party bringing such action to state a clear principle on which it is maintainable." And in *Plummer v. Woodburne* (a), it was held that a judgment obtained by the defendant in the colonial courts cannot be pleaded by way of estoppel to a declaration in this country for the same cause of action, unless it is shewn that the judgment so obtained would be final and conclusive in the colonies. In *Henley v. Soper*, the decree was founded upon an award. From all the authorities, it is clear that a mere order of a court, directing that a sum of money shall be paid, will not sustain an action in our Courts of law; but that it must be shewn that there exists a debt or duty such as the Courts themselves would enforce. In the present case, no such debt or duty is shewn. Besides, it appears from the proceedings of the *Vice-Admiralty* Court, that the Judge reserved the consideration of the premium of insurance; and nothing more appears to have been done as to this part of the case. That of itself is sufficient to shew that there has been no final adjudication in the suit.

4. It appears from the transcript that the Judge of the *Vice-Admiralty* Court gave leave to *Mattei*, the agent of his *Sicilian* Majesty, to amend his claim. That is the only mention that is ever made of the character in which *Mattei* appeared. It is no where shewn that he had any personal interest in the subject-matter of the suit. He

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(a) 7 Dow. & Ryl. 25; S. C. 4 Barn. & Cress. 625.

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being only an agent, therefore, his administrator takes no right under the judgment. The authority of an agent determines with his death; and nothing short of an interest in him will entitle his administrator to sue on a judgment obtained by him. In *Pigott v. Thompson* (a), where *A.* agreed in writing to pay the rent of certain tolls which he had hired, "to the treasurer of the commissioners," it was held that no action for the rent could be maintained in the name of the treasurer, on the ground that he was a mere agent.

5. A Court of common law cannot either directly or indirectly entertain questions of prize. In *Le Caux v. Eden* (b), it was expressly held that an action at law could not be maintained for false imprisonment, where the imprisonment was merely in consequence of taking a ship as prize, although the ship had been subsequently acquitted. Mr. Justice *Willes* there said: "I am of opinion that the action is not maintainable. I may perhaps go upon narrower ground than the rest of the Court, but the rule I lay down is, that, where the injury is the necessary and natural consequence of the capture, the Court of *Admiralty* has the sole and exclusive jurisdiction." And Mr. Justice *Buller* said: "There is no case in which it has ever been holden that such an action would lie; and, if it could be maintained, there are, in every war, such frequent opportunities for it, that it must have happened in every day's practice, or some instances at least must have been in the memory of those who have had long experience in *Westminster-Hall*; but there is not the smallest trace of such a determination, or even *dictum*, in any Court in *England*." That case is an express authority to shew that the Court cannot entertain a matter having a tendency to raise the question of prize or no prize (c).

(a) 3 Bos. & Pul. 147.

(b) 2 Doug. 594.

(c) See *Duckworth v. Tucker*, 2 Taunt. 7, where it was held, that,

if a prize court condemns a captured vessel as prize to his Majesty, the sentence, while unappealed from, is conclusive on the common

[Mr. Justice Gaselee.—In *Le Caux v. Eden*, the plaintiff sought to add something to the judgment of the Court of *Admiralty*; he sought to recover damages.]

In *Mitchell v. Rodney (a)*, it was expressly determined that the question of prize or no prize cannot be tried at common law, but must be decided by the Judge of the High Court of *Admiralty*; and that the jurisdiction depends not upon the locality, or upon the parties, but upon the nature of the question, which is such as cannot be tried by any rules of common law, but by the general law of nations, which is there administered by forms best adapted to the subject of its jurisdiction, and the interests of the parties. In *Walker v. Witter*, Lord Mansfield said: "Foreign judgments are a ground of action everywhere, but they are examinable." In *Arnott v. Redfern*, Lord Chief Justice Best said: "It was decided by the House of Lords, the highest tribunal of the country, in the case of *Sinclair v. Fraser*, that a foreign judgment is *prima facie* evidence of a debt, although it is competent to the defendant to impeach the justice of it, or to shew that it has been irregularly or unduly obtained." If, then, it be competent to the defendant in this case to impeach the justice of the decision of the *Vice-Admiralty* Court, he will thereby in effect take from that Court the exclusive jurisdiction which the whole current of the authorities shews that the law has assigned to it.

law Courts, and on all the world. And see *Faith v. Pearson*, 2 Marsh. 133; 6 Taunt. 439; 4 Camp. 357; Holt, 113—where it was held that no action at law can be maintained for the seizing an *English* merchant ship by a man-of-war, as prize, even though the vessel be released without any proceedings in the *Admiralty* Court, and it

do not appear that there was any probable ground for the seizure. In *Smart v. Wolfe*, 3 Term Rep. 323, it was held that the *Admiralty* Court has jurisdiction over the question of freight claimed by a neutral master against the captor who had taken the goods as prize.

(a) 2 Bro. P. C. 423.

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Mr. Serjeant *Wilde*, in reply.—Before the Courts at *Westminster* will enforce the judgment of a court not of record, they will examine into its proceedings; but it is otherwise in the case of a judgment pronounced by a court of record. In the case of *Arnott v. Redfern*, the action was *assumpsit* upon a judgment obtained by the plaintiff in the High Court of *Admiralty* in *Scotland*; and this Court held that the judgment was *prima facie* evidence of a debt, and that every thing was done in the Court in which it was obtained that was necessary to support it. Where the law has given exclusive jurisdiction to a particular tribunal, the Courts here will, until the contrary be shewn, assume every thing to be done right. It is enough that the Court can see that the judgment of the foreign Court is not inconsistent. In *Appleton v. Lord Braybrook* (a), in *assumpsit* on two judgments recovered in the Supreme Court of *Jamaica*, copies of the judgments purporting to be signed by the clerk of the Court, and certified by him to be true copies, accompanied by a certificate of a notary public of his being clerk of the Court, and by another certificate of the Governor, under the seal of the island, that the person so certifying was a notary public, were held to be admissible evidence to prove the judgments (b).

Lord Chief Justice TINDAL.—It appears to me, that, shaped as are these proceedings of the *Vice-Admiralty* Court of *Malta*, this Court cannot see with sufficient certainty that the defendant is brought within the jurisdiction of the *Vice-Admiralty* Court, so as to render him liable for the amount of this judgment. Expressing no

(a) 6 Mau. & Selw. 34; S. C. 2 Stark. 6.

(b) See *Donaldson v. Thompson*, 1 Camp. 429, where it was ruled by Lord *Ellenborough*, that the

sentence of a Court of *Admiralty* sitting under a commission from a belligerent power in a neutral country, will not be recognised in our Courts.

opinion upon the other points that have been relied on in argument, I confine myself to saying that the defendant is not sufficiently brought within the jurisdiction of the *Vice-Admiralty* Court, and that the proceedings themselves, as set out upon the special case, do not appear with sufficient certainty to enable us to adjudicate thereon.

Except in the title of the cause in the *Vice-Admiralty* Court, no mention is made of the defendant's name. The cause is intituled thus: "*La Madonna della Lettera e Gesu Maria Guiseppe, Francesco Micali*, master, taken by his Majesty's ship of war *Glatton*, *George Miller Bligh*, Esq., commander, and brought to *Malta*:" not meaning, however, that Captain *Bligh* was personally present on the occasion; for, it is very well known, that, when a vessel is captured, the prize is sent into port under the care and management of an inferior officer and part of the crew of the capturing vessel, and that the suit for condemnation in the *Vice-Admiralty* Court is proceeded with at the instance of a prize-agent, the commander himself not personally acting. The monition is issued on the prayer of the proctors of *Gregory Mattei*, who is stated to be the agent of his *Sicilian* Majesty, and as such making a claim of territory for the ship and cargo, as being the property of *Sicilian* subjects. From this monition, which is dated the 27th of *October*, 1810, it also appears that the defendant was not present at that period of the proceedings. The return thereto, or certificate of service states "that the original monition was personally served on the within-mentioned *William Robertson* (who is described in the monition as the agent of Captain *Bligh*), by shewing to him the within monition under seal, and by leaving with him a true copy thereof;" and "that the aforesaid monition was not served on the within-mentioned *George Miller Bligh*, by reason of his having left this island some time ago, and that he has not at present re-

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turned to *Malta*—an allegation leaving it altogether uncertain when the defendant had left the island.

I do not rest my opinion so much upon the circumstance of the defendant's not being personally present during the continuance of these proceedings, because I have felt the force of the argument urged on the part of the plaintiff as to the duty of Captain *Bligh*, as captor of the vessel, to carry her to the nearest port where a Court of *Admiralty* was established, and there to institute proceedings for the purpose of procuring her condemnation. Still, however, something must appear to have been done by him. In the first place, he must have appointed a proctor. No such appointment is set out on these proceedings. In civil Courts the proctor is a person of infinitely more importance in the suit than is an attorney in our common law Courts. He is *dominus litis*. It is to him alone that the Court looks for the regularity of the proceedings. His appointment is a circumstance that is attended with considerable solemnity; it is made under the hand and seal of the party, and is one of the acts in the suit (a). The witness who was called at the trial also stated that the appointment of Captain *Bligh's* proctor would be set out upon the record of the proceedings. To make the defendant personally liable, therefore, for the result of the proceedings in the *Vice-Admiralty* Court, I think the appointment of the proctor should have been set out. The plaintiff himself has selected such parts of the proceedings as he has thought proper to bring before the Court. The transcript shews that the *entire* proceedings are not set out; for it begins thus—"We do by these presents make known and signify unto you, that, upon examining the records of our *Vice-Admiralty* Court of the island of *Malta*, and territories thereunto belonging, kept by *John Locker*, Esq., the principal registrar of the said Court, we do find *certain* interlocutory decrees, instru-

(a) See *Clerke's Praxis*, part. 1, s. 1.

ments, and proceedings, had, made, and prosecuted in our said *Vice-Admiralty* Court, in a certain cause or business intituled, &c." The plaintiff, therefore, having omitted fully to set out the record of the proceedings in the cause in the *Vice-Admiralty* Court, I am not satisfied but that, if produced, it would appear therefrom that this defendant is not personally liable upon the supposed judgment pronounced in that Court.

It further appears, upon the face of the proceedings as set out, that the person described in one part as the agent of Captain *Bligh*, was not in fact his agent. If any person in *Malta* was Captain *Bligh's* agent it was *William Robertson*. The monition itself states that repeated applications had been made to him for payment of the amount of special damages and demurrage; and he, as agent, is monished to pay such amount. But it appears from the very next document set out upon the record, that *William Robertson* was not the agent of Captain *Bligh*. *Jackson*, who probably was an advocate, or a proctor, and who in the earlier stages of the proceedings appeared on behalf of the party seeking the condemnation of the captured vessel, seems then to have changed his character; for, the record of the proceedings subsequent to the monition, *viz.* on the 28th *November*, 1810, states that "*Jackson* appeared for Mr. *William Robertson*, and alleged him not to be the agent of his Majesty's ship *Glatton*, and that he was not in possession of any effects belonging to the said ship; and prayed him to be dismissed from all observance of justice in this matter." That statement does not seem to have been contradicted; for the proceedings are abruptly terminated. We must, therefore, take it that the opposite party was not able to deny the facts so alleged. Now, if *William Robertson* be taken not to be the agent of Captain *Bligh*, it appears that the proceedings were had when he was neither personally within the jurisdiction of the *Vice-Admiralty* Court, nor present by an agent.

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But a more important objection to these proceedings, I take to be this:—On the 15th *April*, 1809—“The Judge, having heard the aforesaid claim (the claim of territory) and evidence and proofs read, at the petition of *Fenton*, on motion of counsel, and with consent of *Jackson*, admitted the aforesaid claim, pronounced the goods to be long as claimed, and by interlocutory decreed the same to be restored to the claimant for the use of the owners and proprietors thereof; and, having heard advocates and proctors on both sides, by further interlocutory decree, pronounced demurrage to be due from the day of the capture to the 4th day of *March* last, as also interest on the value of the cargo for such period, and *special damage if any can be shewn*, but gave no costs: and further reserved the consideration of premium of insurance.” Probably there was afterwards a reference to the registrar and a committee of merchants, to report as to the damages; for, on the 14th *March*, 1810, we find the following entry on record: “The Deputy Registrar’s report as to damages is confirmed if not objected to by this day. The Judge was pleased to confirm said report of damages.” On the 10th *October*, 1810, *Fenton* and *Allen* alleged, that, on the 14th *March* last, the registrar’s and merchants’ report as to special damage was confirmed, and that their client had made repeated applications to the captors’ agent for the payment of the amount of said special damages as confirmed, but that he had not been able to obtain the same, and prayed the Judge to decree a monition to issue forth against the said captors and their agent, for the payment of such special damages.” Upon this, the monition, which I apprehend is in the nature of a writ of execution, is issued “against the said *George Miller Bligh*, the captor of the said ship and cargo, and *William Robertson*, the agent of the said captor, to pay to the said claimant the sum of 2991 scudi, 11 taris, and 11 grains, of *Malta* currency, being the amount of said

special damages and demurrage as confirmed, besides the charges of this monition, and the execution thereof." But nothing in the shape of a judgment or decree of the Court authorizing the issuing of this monition appears on the face of the proceedings.

It seems to me, therefore, that we should be deciding in the dark, if, upon this defective transcript of proceedings of the *Vice-Admiralty* Court, we were to hold the defendant personally liable. Parties who sue in the Courts at *Westminster* upon foreign judgments should take care that the proceedings are regularly and correctly recorded. In the present case, that formality is more particularly requisite; an interval of more than twenty years has elapsed since the happening of the event which gave rise to this suit: consequently, the defendant would be deprived of all means of properly investigating the circumstances. I am satisfied, however, with saying that I do not see a possibility on the face of these proceedings, to arrive at the conclusion that the defendant should be held personally liable to the consequences of this supposed judgment.

Without, therefore, entering into a consideration of the other objections that have been urged to the plaintiff's right to maintain this action, I think, for the reasons I have above given, there should be judgment of nonsuit.

Mr. Justice PARK.—I entirely concur with what has fallen from my Lord Chief Justice. His Lordship has stated the true ground upon which the decision of this Court turns, *viz.* that the proceedings of the *Vice-Admiralty* Court of *Malta*, as set out in the special case, are not sufficient to sustain a judgment for the plaintiff. In the commencement, the transcript states "We do find *certain* interlocutory decrees, instruments, and proceedings, &c," That evidently shews that those things that are set out there are mere garbled extracts from the records of the proceedings of the *Vice-Admiralty* Court, not the proceedings themselves. No libel is set forth, nor

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any responsive allegations. The first proceeding that appears is a territorial claim for the ship and cargo made by one *Gregory Mattei*. At the commencement, it does not appear who *Mattei* is, or for whom he claims. He is afterwards stated to be the agent of his *Sicilian* Majesty. It appears that the Judge admitted the territorial claim, and by interlocutory decreed the ship and cargo (with a certain exception) to be restored to the claimant for the use of the owners and proprietors thereof, *reserving the question of costs and damages*. A person of the name of *Jackson* appears to have opposed the claim of *Mattei*; but it nowhere appears who this *Jackson* was, for whom he appeared, or by whom appointed. On a subsequent day, the Judge proceeded to a consideration of the reserved question of costs and damages, and "by further interlocutory decree pronounced demurrage to be due from the day of the capture, *viz.* the 5th of *January*, to the 4th day of *March* last, as also interest on the value of the cargo for such period, and special damage *if any can be shewn*; but gave no costs: and further reserved the consideration of premium of insurance." The next proceeding set forth is the confirmation of the registrar's and merchants' report as to damages; but there is no statement of the amount of such report. Then comes an application by *Fenton* and *Allen* stating that their client (*M. Mattei*) had made repeated applications to the captor's agent for the payment of the amount of the said damages as confirmed, and praying a monition. The monition accordingly issues, calling on the defendant, "the captor of the said ship and cargo, and *William Robertson*, the agent of the said captor, to pay to the said claimant the sum of 2991 scudi, 11 taris, 11 grains, of *Malta* currency, being the amount of said special damages and demurrage as confirmed, *besides the charges of that monition, and of the execution thereof*." From this monition it does not appear by virtue of what decree it was obtained. The amount of costs, too, is left in uncertainty. The Deputy Marshal of

the *Vice-Admiralty* Court is by this precept commanded to monish *George Miller Bligh*, the commander of the ship *Glatton*, the captor of the *Sicilian* vessel, and *William Robertson*, the agent of the captor. The return thereto states that the monition was personally served on *William Robertson*, but not upon Captain *Bligh*, by reason of his having left the island. An attachment being afterwards prayed on the part of the claimant, "*Jackson* appeared for *Robertson*, and alleged him not to be the agent of the *Glatton*, and that he was not in possession of any effects belonging to the said ship; and he prayed him to be dismissed from all observance of justice in the matter." If such were the fact, why did not the party go on and prove that *Robertson* was the defendant's agent, as alleged. Nothing of the kind was attempted; and no further step appears to have been taken in the matter until the commencement of this action.

To give effect to proceedings of this sort, the greatest formality and precision are required. In the present instance, the whole proceedings transmitted to us are so grossly imperfect that it is impossible for us to say that the defendant is shewn to have incurred any personal liability to the judgment that is supposed to have been pronounced against him.

Assuming *Gregory Mattei* to have been duly constituted agent for his *Sicilian* Majesty, I am by no means prepared to say that his personal representatives have any right to institute these proceedings; though, upon that point, it is unnecessary for us to give any opinion.

Mr. Justice GASELEE.—I entertain no doubt as to the authority of this Court to enforce the judgment in question, provided it had been properly set out on the face of the proceedings. Neither do I doubt but that these decrees, though called interlocutory, are in effect final. There is, however, a considerable degree of doubt as to

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whether the defendant ever properly appeared in the *Vice-Admiralty* Court. Still there is great weight in the argument urged on the part of the plaintiff, that it was the duty of Captain *Bligh*, on capturing the vessel, to carry his prize into port, and take the necessary steps for procuring her condemnation; and that therefore it must be assumed, as against him, that he had done his duty.

The ground upon which I concur with the rest of the Court is, that, upon the face of the proceedings, I find no decree for the payment of any specific sum of money. The first decree is for the restoration of the ship and cargo. By a second interlocutory decree, demurrage is pronounced to be due, as also interest on the value of the cargo for the period of the vessel's detention, and special damage if any can be shewn. The question of damages is then of course referred to the registrar and merchants; for, the next entry we find states that the registrar's report as to damages was confirmed by the Judge. That shows the judgment to have been in itself imperfect. No mention is made in the decretal part of the proceedings of any definite sum which the claimant is entitled to recover. The sum first appears in the monition. Now, the monition forms no part of the judgment of the Court; the judgment must have preceded it. The monition is nothing more than a writ of execution. It may be assimilated to our writs of *capias ad satisfaciendum* or *fieri facias*, which would not be held here to be evidence of a prior judgment. In decrees made by the Court of *Chancery*, founded upon the Master's report, the report is always set out; but here the registrar's and merchants' report does not appear at all.

Upon the whole it seems to me that the decrees in this case are defective for not particularly stating the amount decreed to be paid, and consequently that there must be judgment of nonsuit.

I am not prepared to say whether the representative of *Mattei* is entitled to maintain an action to enforce any

supposed claim of his in this matter, or whether the right, if any, did not pass to his successor in office. It is not necessary for us to decide that question upon the present occasion. It is enough for us to say that there is no specific judgment of the *Vice-Admiralty* Court to recover the sum mentioned in the monition.

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Mr. Justice ALDERSON.—I am also of opinion that the proceedings set out in the special case are too imperfect to enable the Court to pronounce any other than a judgment of nonsuit. It is for the plaintiff to make out his right to appear. The proceedings should have distinctly disclosed who *Mattei* was, so as to make it appear to the Court that the plaintiff was entitled, as his representative, to sue upon a judgment obtained by him.

The claim upon which the *Vice-Admiralty* Court proceeded was preferred by *Mattei*. It does not, however, appear upon the face of the record sent hither, in what character this person claimed, whether as an agent for others or on his own behalf. Subsequently, the Court decrees the ship and cargo to be restored to *Mattei*, for the use of the owners and proprietors, reserving the question of special damage. A reference is then made to the registrar and merchants, to ascertain the amount of special damage. It nowhere appears what report the registrar made. All that does appear in the decretal part of the proceedings is, that the report was confirmed. But there is no judgment decreeing a specific sum to be paid. Then comes the prayer of a monition, stating that the registrar's and merchants' report as to special damage was confirmed, and that repeated applications had been made to the captors' agent for the payment of the amount of said special damages as confirmed, but that the party had not been able to obtain the same. The monition thereupon issues. I agree with my brother *Gaselee*, that the monition forms no part of the judgment. Application is afterwards made for an

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attachment against *William Robertson*, who is alleged to be the agent of the captors. To this there is an appearance on the part of *Robertson*, denying his agency. What further steps were taken the proceedings do not shew. It is perfectly consistent with all that appears on this record, that the Court afterwards decreed that *William Robertson* was the agent of Captain *Bligh*, or that he had in his possession effects belonging to the ship *Glatton*, and that he has satisfied the judgment. The whole proceedings, therefore, are manifestly irregular and imperfect.

Judgment of nonsuit (a).

(a) See *Dalglish v. Hodgson* (5 Moore & P. 408; S. C. 4 Bing. 686), where it was held, that the sentence of a foreign Court of *Admiralty*, condemning a vessel for attempting to violate a blockade, is not conclusive, unless the fact upon which the condemnation proceeded appears upon the face of the sentence, free from doubt and ambiguity: but that cannot be collected by mere inference, nor can it be left in uncertainty whether the vessel was condemned upon one ground, which would be

a just ground of condemnation by the law of nations, or on another ground, which would only amount to a breach of the municipal regulations of the condemning country.

In *Bernardi v. Motteux*, 2 Doug. 575, it was held that a condemnation by a foreign Court of *Admiralty* is not conclusive evidence that the ship was not neutral, unless it appear that the condemnation went upon that ground. And see *Bolton v. Gladstone*, 2 Taunt. 85.

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DUNCAN v. PASSENGER.

It is no ground of special demurrer, that the *venue* stated in the margin of the declaration is not repeated in the body.

IN the margin of the declaration in this case were the words "*Middlesex* to wit," which was the only statement of *venue* throughout.

The defendant demurred specially.

Mr. Serjeant *Adams*, in support of the demurrer.—Al-

though, according to the case of *Mellor v. Barber* (a), the objection could not be taken on general demurrer, yet the language of the judgment in that case shews that it may be on special demurrer. Mr. Justice *Buller* there says: "On a *special* demurrer there might have been some doubt."

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Mr. Serjeant *Storks*, *contra*, was stopped by the Court.

Lord Chief Justice TINDAL.—It seems to me, that, to raise this objection with effect, it should come with a declaration having no reference to the *venue* in the margin. The words "then and there" throughout this declaration clearly have reference to the *venue* laid in the margin. The declaration certainly is not drawn with strict technical precision; but still I think it sufficient. In *Howse v. Haselwood* (b), which is referred to in the case cited, the Court say—"The county in the margin *will help*, but not *hurt*."

The rest of the Court concurring—

Judgment for the plaintiff.

Mr. Serjeant *Adams* afterwards moved for leave to plead; but the Court required him to produce an affidavit of merits.

(a) 3 Term Rep. 387.

(b) Barnes, 4to ed. 483.

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OAKLEY v. ADAMSON.

In case for obstructing a right of way, the plaintiff proved an uninterrupted user for seventeen years. The defendant claimed a right to the soil under a subsequent demise, containing (amongst others) a covenant that the lessee should contribute a rateable proportion of the expense of repairing the fences, paths, ways, &c., used in common with the occupiers of other premises near or adjoining thereto, belonging to the lessor. It appeared that the passage over which the plaintiff claimed a right of way was the only one to which this covenant could apply:—*Held*, that the right of way in the plaintiff was not inconsistent with the demise to the defendant.

THIS was an action on the case brought against the defendant for obstructing a right of way claimed by the plaintiff under a lease granted to him by the superior landlord of the premises on the 1st *May*, 1819. The property in question was situate in the county of *Middlesex*, but the lease was not duly registered.

The cause was tried before Lord Chief Justice *Tindal*, at the Sittings in *London* after the last *Michaelmas* Term. The plaintiff claimed a right of way on foot and on horseback. The passage along which the right in question was claimed, was between the premises occupied by the plaintiff and those in the occupation of the defendant. The defendant claimed the exclusive right to the soil of this passage, under a lease bearing date the 1st *April*, 1820, and registered on the 19th *October* following, by which the lessor absolutely granted to him three cottages together with all ways, passages, &c., including by the measurement the way in dispute. This lease contained (amongst others) a covenant that the defendant (the lessee) should contribute a rateable proportion of the expense of repairing the fences, *paths, ways, &c.*, used in common with the occupiers of other premises near or adjoining thereto. It appeared from the evidence, that the adjoining premises belonged to the same landlord, and that the way in question was the only one to which the covenant could apply. It further appeared that the plaintiff had used the way as a foot-way without molestation ever since he first occupied the premises, in 1814.

His Lordship thought the defendant's lease not inconsistent with a right of way in the plaintiff.

The jury accordingly returned a verdict for the plaintiff—damages one shilling—affirming the right of foot-way.

Mr. Serjeant *Andrews*, in the last term, obtained a rule nisi that this verdict might be set aside, and a nonsuit entered, or a new trial had.

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Mr. Serjeant *Wilde* now shewed cause.—The covenant in the defendant's lease, to contribute a rateable proportion of the expense of repairing and maintaining the paths and ways used in common with the occupiers of other premises near or adjoining thereto, coupled with the evidence given in the cause, clearly shewed that the premises were not granted to the defendant freed from the right of way claimed by the plaintiff: and the finding of the jury fully established a right of foot-way.

Mr. Serjeant *Andrews*, in support of his rule, submitted that the right of way claimed by the plaintiff was inconsistent with the absolute right to the soil of the passage which was conveyed to the defendant by the lease of the 1st April, 1820,

Lord Chief Justice TINDAL.—No doubt a right of way is granted to the lessee by the lease of the 1st May, 1819, but we are not at liberty to look at that instrument. The evidence of user of the way in question was pretty strong to shew that it had been enjoyed by the plaintiff as a foot-way. There could therefore be no doubt (considering it as a valid lease) that the landlord meant to demise the right of way. But it is contended, that, in consequence of a subsequent grant inconsistent with the lease of the preceding year, the first lease not being registered in the proper office, and therefore being fraudulent and void as against a subsequent purchaser, the right of way in question did not pass thereby. The question then is, whether looking at the lease of 1820, we must come to that conclusion, or whether there is not upon the face of it such ambiguity as to warrant our looking to the evidence of the

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exercise of the rights under the respective demises. Let us see whether under the second lease the right to the soil of the *locus in quo* so passed as to render void the first lease. It appears that the passage in question was included in the measurement of the land passing by that deed; and therefore it is not impossible that the lessor meant to convey to the defendant the soil of that passage. But there is a covenant in the lease, that the defendant shall contribute a rateable proportion of the expense of repairing the fences, *paths, ways, &c.*, used in common with the occupiers of other premises near or adjoining thereto, which adjoining premises, it appears, belonged to the lessor: and, upon the evidence, it appeared that the way in question was the only one upon which that covenant could have any operation. If we cannot give effect to this covenant otherwise than by applying it to this passage, it appears to me that the second grant is not inconsistent with the grant of the right of way by the former lease. On the face of the second lease there is a stipulation that is strictly compatible with the existence of a similar right in other persons; and the evidence abundantly shewed that the plaintiff had exercised that right. Seeing that there is a difficulty in reconciling the ambiguity patent upon the face of the second lease, we are justified in looking at the facts relative to the enjoyment under it. Upon the whole I am satisfied that the lessee under the second lease took the property conveyed thereby subject to a right of way. I am therefore of opinion that the verdict ought not to be disturbed.

Mr. Justice PARK.—I am of the same opinion. No doubt the subsequent purchaser must under the circumstances be preferred, had there been anything to shew the inconsistency of the co-existence of the two rights. It is clear upon the evidence that the plaintiff did use the right of way he claims: and I think the second grant was not intended to deprive him of that right.

Mr. Justice GASELEE.—The evidence of user puts an end to the case; there being no other passage used in common with the occupiers of the adjoining premises than the one in question.

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Mr. Justice ALDERSON concurred.

Rule discharged.

HUTCHINSON v. BLACKWELL.

MR. Serjeant *Taddy*, on a former day in this term, obtained a rule *nisi* to enter up judgment pursuant to the award of an arbitrator to whom the matters had been referred, or that the Court might order that the plea should be withdrawn and a *cognovit* entered for the amount of the damages. The action was commenced in this Court, and issue joined, the record passed, and jury process awarded and returned, but the cause had not been entered for trial; when the parties entered into an agreement to leave the cause, and the subject-matter thereof, and *the issue therein*, and the costs of such action, to the arbitrament, final end, and determination of a barrister, and to abide by and perform such award, order, and determination as the said arbitrator should make of and concerning the matters, disputes, and differences subsisting between them as thereinbefore mentioned; that the costs of the reference, award, and action should be in his discretion; and that the submission should be made a rule of the Court of *King's Bench*. The submission had been made a rule of the Court of *King's Bench*; and the arbitrator had ordered that a verdict should be entered for the plaintiff for 20*l.* 10*s.*, and that the costs of the cause should be paid by the defendant.

Friday,
April 27th.

By agreement before the cause was set down for trial, the parties referred "the cause, and the subject-matter thereof, and the issue therein, and the costs of such action," to the award of a barrister:—*Held*, that the arbitrator had no power to order a verdict to be entered.

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Mr. Serjeant *Wilde*, now shewed cause.—This was not a reference by order of *Nisi Prius*, but a mere agreement between the parties, wherein they have stipulated that the submission shall be made a rule of the Court of *King's Bench*. This Court therefore has no authority to order a verdict to be entered; neither is such power given to the arbitrator.

Mr. Serjeant *Taddy*, in support of his rule.—An issue has been duly joined between the parties in this Court; and the agreement is that the arbitrator shall have power to award upon the issue: he has also power to determine upon the costs in the cause. He has, therefore, substantially authority to enter up the verdict.

[Mr. Justice *Alderson*.—I remember a case wherein the Court of *Exchequer* set aside an award upon the same objection.]

At all events, if the Court cannot, under the circumstances, direct the verdict to be entered pursuant to the award, they may, in order to meet the justice of the case, order that the plea be withdrawn, and the damages stand as agreed.

Lord Chief Justice TINDAL.—The substantial justice of the case would be met by the course suggested; but, looking at the terms of the submission, I am of opinion that we have no authority to do that which is required by the plaintiff. In ordinary cases, provision is made that the arbitrator shall be at liberty to enter up a verdict, and that no writ of error shall be brought thereon. The omission of that provision in the present case seems to shew that it was not the intention of the parties to give the arbitrator power to order a verdict to be entered, but that they meant to rely on an attachment to enforce the performance of the award. If from some unfortunate mistake

the parties have not expressed what was intended, we cannot help them.

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MR. Justice PARK.— The Court has no power to order a *retraxit* of the plea, or to assess the damages; neither can we order a verdict to be entered on the *postea*. The parties should have pursued the ordinary form of the rule of reference.

The rest of the Court concurring—

Rule discharged.

HIND, Demandant; RADDEN, Tenant; HAWKINS,
Vouchee.

Friday,
April 27th.

MR. Serjeant *Spankie* moved that a recovery, which was suffered by Sir *Christopher Hawkins*, in *Trinity Term*, 1780, might be amended, to make it conformable with the deed to lead the uses. The deed comprised several estates, and, among others, three fifths of *five* messuages (particularly described) in the parish of *St. Dennis*, in the county of *Cornwall*. The recovery only mentioned three fifths of *one* messuage. The affidavits upon which the motion was founded stated distinctly that the possession had gone ever since the recovery was suffered agreeably to the amendment prayed, and that the misdescription was merely accidental.

The Court allowed a recovery suffered in 1780, to be amended by the insertion of three fifths of *five* messuages instead of *one*, to make it conform with the deed.

PER CURIAM—

Fiat (a).

(a) See *Collingwood*, dem., *Wilmot*, ten., *Howe*, vouchee, 1 Brod. & Bing. 83—*Kenrick*, dem., *Owen*, ten., *Owen*, vouchee, 3 J. B. Moore, 70.

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The payment of costs for not proceeding to trial, is not a condition precedent to the party's right to proceed to trial; but such costs may be set off against the costs in the cause.

DOE *d.* HOPE *v.* CARTER.

THIS was an action of ejectment tried before Lord Chief Justice *Tindal*, at the Sittings in *London* after the last term. The question at the trial was whether a certain conveyance under which the defendant claimed had been executed *bona fide* and for a valuable consideration. The *bona fides* of the transaction was established, and a verdict found for the defendant. On a former occasion, the trial had been postponed at the instance of the defendant, on the terms of his paying the costs of the day. These costs, which were taxed at 27*l.*, had never been demanded.

Mr. Serjeant *Wilde*, on the first day of this term, on the part of the defendant, obtained a rule *nisi*, that the above-mentioned interlocutory costs might be set off against the general costs in the cause, or that the proceedings might be stayed, the defendant undertaking to pay the costs within seven days (*a*).

Mr. Serjeant *Andrews*, now shewed cause, upon an affidavit of the plaintiff's attorney, who claimed a lien for his costs, stating that he should be a loser by his client if the set-off were allowed.—He referred to the case of *Aspinall v. Stamp* (*b*), where by a Judge's order the defendant was allowed to go to trial upon payment of a certain sum of money, together with the costs of the cause up to the date of the order; and the defendant having recovered a verdict, without previously complying with the terms of the order—it was held that the costs taxed in his favour on the *postea* could not be set off against the interlocutory

(*a*) The lessor of the plaintiff on the same day moved for an attachment for non-payment of these costs.
(*b*) 4 Dow. & Ry1. 716; S. C. 3 Barn. & Cress. 108.

costs, so as to deprive the plaintiff's attorney of his lien: and he contended, that, inasmuch as the plaintiff might have insisted upon payment of the costs of the day before the defendant could be permitted to go to trial, he ought not to be prejudiced by his omission to do so, by which the defendant had gained an advantage.

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Mr. Serjeant *Wilde*, in support of his rule.—The affidavit of the plaintiff's attorney does not positively allege that he has a lien for his costs; it merely in a guarded manner states that he will be a loser by his client if the set-off is allowed. In this Court the attorney's lien is subject to the equities between the parties. In *Emerson v. Lashley* (a), the Court ordered the costs awarded to the plaintiff in an action in the Lord Mayor's Court, to be deducted by the Prothonotary from the costs allowed to the defendant in an action here.

Lord Chief Justice TINDAL.—The payment of the interlocutory costs by the defendant certainly was not strictly speaking a condition precedent to his right to proceed to trial, but it was a bargain between the parties by which the defendant has obtained an advantage in the postponement of the trial. Undoubtedly the plaintiff might, had he proceeded strictly, and moved for an attachment, have obtained his costs at the time. We cannot say that his attorney is to suffer for the indulgence he has granted to the defendant. I think, therefore, that, on its being made out to the satisfaction of the Prothonotary that something is due to the attorney for the costs in this cause, the rule should be made absolute, subject to his lien.

Rule absolute accordingly (b).

(a) 2 H. Blac. 248.

Term, 2 Will. 4, *ante*, p. 429, it

(b) By Reg. Gen. 93, *Hilary* is ordered, that—"No set-off of

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BELL and Another, Assignees of the Sheriff of MIDDLESEX, v. FOSTER and Others.

Where the notice of bail is merely informal, and not an absolute nullity, the plaintiff cannot take an assignment of the bail-bond.

An omission to describe the bail, in the notice, as housekeepers or freeholders, as required by the rule of *Trinity Term*, 1 *Will.* 4, can only be objected to when the bail come up to justify.

MR. Serjeant *Wilde*, on a former day in this term, on the part of the bail in this cause, obtained a rule *nisi* to set aside the plaintiffs' proceedings on the bail-bond, of which the plaintiffs had taken an assignment, on the ground of an irregularity in the notice of bail, which omitted to describe the bail as housekeepers or freeholders, as required by the rule of *Trinity Term*, 1 *Will.* 4 (a). The assignment of the bail-bond was taken on the 4th of *February* last, and other bail were perfected, upon a regular notice, on the 11th.

Mr. Serjeant *Jones* now shewed cause.—The rule in question not having been complied with, the notice of bail was a mere nullity. The object of the rule was to give to the plaintiff the most perfect information as to the parties who are to become bail; and it is incumbent on the defendant to bring himself within the protection of the rule. In *Wallace v. Arrowsmith* (b), the plaintiff was held entitled to take an assignment of the bail-bond, the notice of

damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought; provided, nevertheless, that interlocutory costs in the same suit awarded to the adverse party may be deducted."

In another case in this term—*Wilson v. Collins*—the Court discharged a rule *nisi* that had been obtained on the part of the defendant to defer the trial of the

cause until the payment by the plaintiff of interlocutory costs for not proceeding to trial on a former occasion; holding that, in ordinary cases, the payment of such costs is not a condition precedent to the plaintiff's right to proceed to trial. The rule of Court above mentioned conditionally provides for such costs.

(a) See 5 Moore & Payne, 813; 7 Bing. 782.

(b) 2 Bos. & Pull. 49.

bail being a nullity. And in a case in this Court, last term, where it was objected that the notice did not, in conformity with the rule, state the residence of the proposed bail during the last six months, and omitted to describe the nature and value of the property in respect of which they proposed to justify, the Court held the objection valid (a).

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FOSTER.

Mr. Serjeant *Wilde*, in support of his rule, submitted that the exception to the notice should have been taken when the bail came up to justify: and that the notice could not be treated as a mere nullity, as in *Wallace v. Arrow-smith*, where the bail were attorneys' clerks.

Lord Chief Justice TINDAL.—The only question to be considered in this case is, whether the notice of bail that has been given was informal only or an absolute nullity: if the latter, the plaintiff's proceeding was strictly regular; but, if the notice was merely informal, and such as the judgment of the Court ought to have been exercised upon, then the plaintiffs had no right to take an assignment of the bail-bond. It seems to me that the notice falls within the latter description. It is not every trifling error that will enable a plaintiff to take the proceedings out of the control of the Court. If it were so, a blank left in the notice, for a street, or for the number of a house, or the like, might be held to authorize an assignment of the bond. This would evidently be leading the parties into a great and unnecessary expense that was not contemplated by the rule. The proper time for the plaintiffs to object to the notice was, when the bail appeared to justify. I think the rule must be made absolute.

Mr. Justice PARK and Mr. Justice GASELEE concurred.

(a) *Anonymous, ante*, p. 296.

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Mr. Justice ALDERSON.—The Court would not as a matter of course absolutely set aside the bail upon such an objection to the notice as this. They might probably allow the defendant time to give a fresh notice. By taking an assignment of the bail-bond, the plaintiffs in this case have taken upon themselves to deprive the Court of the power of doing that which they might conceive the justice of the case to require.

Rule absolute.

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April 27th.

The motion under the 49th rule of *Hilary*, 1 *Will.* 4, that sticking up a notice of declaration in the office may be deemed good service, where the defendant's residence is unknown, is *absolute* in the first instance.

BRIDGER v. AUSTIN.

MR. Serjeant *Spankie*, on the part of the plaintiff, moved for a rule that the sticking up the notice of declaration in this cause in the office might be deemed good service thereof upon the defendant, under the rule of *Hilary* Term, 2 *Will.* 4 (a), by which it is ordered, that, "where the residence of a defendant is unknown, notice of declaration may be stuck up in the office, but not without previous leave of the Court."

The affidavit in support of the motion stated the last known place of abode of the defendant, that he had not been there for two months past, and that the deponent, notwithstanding diligent endeavours, could not ascertain where his present residence was.

PER CURIAM.

Rule absolute.

(a) *Ante*, p. 421.

DUNCAN v. EVERETT.

MR. Serjeant *Andrews*, on a former day in this term, obtained a rule *nisi* that the bail-bond given by the defendant (a bankrupt) on his arrest at the suit of the plaintiff in this cause might be delivered up to be cancelled, on the ground of his having since obtained his certificate.

Mr. Serjeant *Taddy* now shewed cause, on an affidavit wherein it was suggested that the certificate had been obtained by fraud.

Mr. Serjeant *Andrews*, *contrà*, submitted that the Court would not, on motion, try the validity of the certificate.

The COURT (the parties consenting) suspended the rule, directing a feigned issue to try whether or not the certificate had been fraudulently obtained; the party affirming the fraud to be the plaintiff in such issue.

Rule suspended accordingly.

HANCOCK and Another, Assignees of JOHN NICHOLLES, a
Bankrupt, v. CAFFYN.

Monday,
April 30th.

THIS was an action on the case brought by the plaintiffs, assignees of one *John Nicholles*, a bankrupt, to reco-

The defendant held premises under a lease from one *J. H.*,

at a certain rent; and entered into an agreement with one *N.* for the sale of all the household furniture, &c., on the premises for a certain sum, to be paid by instalments—covenanting, on payment of the whole of the purchase-money, to demise the premises to *N.*, for twenty-five years; the lease to contain the like covenants on the part of *N.* as were contained in the lease under which the defendant held. The agreement also contained a covenant that *N.* should, in the mean time, and until such lease should be granted, pay the rent and perform all the covenants which would be to be performed by him in case the lease was actually granted: with a power of distress for non-payment of the rent. *N.* was let into immediate possession under this agreement, and paid rent. The defendant neglecting to satisfy the rent due to the superior landlord, the latter distrained and sold the goods of *N.*:—*Held*—*first*, that the agreement amounted to a present demise—*secondly*, that there was an implied duty in the defendant to indemnify *N.* from the consequences of the non-performance of his covenants with the superior landlord—*thirdly*, that *case* was a proper form of action for the breach of this implied duty—and, *fourthly*, that the injury resulting to *N.* from the distress, gave a right of action to his assignees appointed under a commission subsequently issued against him.

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Saturday,
April 28th.

On a motion to cancel a bail-bond, on the ground that the defendant (a bankrupt) had since obtained his certificate, it being suggested that the certificate had been obtained by fraud, the Court (the parties consenting) directed an issue to try that fact.

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ver damages for an injury resulting to the estate of the bankrupt, under the following circumstances:—

The bankrupt, in the month of *September*, 1828, contracted to purchase from the defendant a lease of a house situate in *Grosvenor Street*, together with certain household furniture, fixtures, paintings, &c., therein, for the sum of 1600*l.*, 400*l.* of which were paid down at the time of taking possession, and the residue to be paid by instalments. Articles of agreement were accordingly entered into between the parties, bearing date the 10th *September*, 1828, whereby, after certain stipulations touching the payment of the purchase-money, the defendant agreed “to sell to the said *John Nicholles* all the household goods and furniture, fixtures, paintings, and other chattels and effects then in, upon, or about the messuage or tenement and cottage and premises thereafter agreed to be demised;” and the defendant did thereby, for himself, his heirs, executors, and administrators, covenant and agree to and with the said *John Nicholles*, his executors, administrators, and assigns, that he, the defendant, his executors, administrators, or assigns, should and would immediately after full payment of the said sum of 1200*l.* (the balance of the purchase-money) and interest, pursuant to the covenant in that behalf thereafter contained, well and effectually, by indenture, demise and lease unto the said *John Nicholles*, his executors, administrators, and assigns, all that messuage or tenement situate and being No. 21 in *Lower Grosvenor Street*, in the parish of *St. George, Hanover Square*, in the county of *Middlesex*, with the cottage built behind the same, and all the appurtenances thereunto belonging, as the same had been for some time prior to the execution thereof in the occupation of the said defendant, and of which possession had been or was intended to be given that day to the said *John Nicholles*, To hold the same unto him the said *John Nicholles*, his executors, administrators, and assigns, from the day of the date thereof for the term of twenty-five years, at the yearly rent of 250*l.*, payable

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quarterly, &c.; and it was thereby agreed, that, in such indenture of lease, there should be contained the like covenants and agreements on the part of the said *John Nicholles*, his executors, administrators, and assigns, as were contained on the part of the lessee in the indenture of lease whereby the said defendant held the said premises, with others, and also all other usual and reasonable covenants, provisions, clauses, and agreements whatsoever." Then followed covenants on the part of *Nicholles*, that he should and would "purchase the aforesaid household goods and furniture, paintings, and other chattels and effects, and the benefit of the covenant and agreement thereinbefore contained for the demise of the said messuage or tenement, cottage, and premises, at the aforesaid price or sum of 1600*l.*;" and also for the due payment of the instalments of the purchase-money, with interest, on the days agreed on; "and also that he the said *John Nicholles*, his executors, administrators, or assigns, should and would accept such lease as aforesaid, upon the terms and conditions thereinbefore specified, and execute a counterpart thereof; and also should and would, in the mean time, and until such lease should be granted, well and truly pay or cause to be paid unto the said defendant, his executors, administrators, and assigns, the said yearly rent or sum of 250*l.* on the respective days and in the manner thereinbefore appointed for payment of the same, and also well and truly observe, perform, and keep all and singular the covenants and agreements which would be to be performed and kept by him the said *John Nicholles*, his executors, administrators, or assigns, in case the said lease was actually granted: Provided always, and the said *John Nicholles* did thereby, for himself, his heirs, executors, administrators, and assigns, covenant, grant, and agree to and with the said defendant, his executors, administrators, and assigns, that if, at any time thereafter, before the said lease should be granted, the said yearly rent or sum of

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250*l.*, or any part thereof, should be unpaid for the space of fourteen days next after any or either of the quarterly days of payment thereinbefore appointed for payment of the same, then it should be lawful for the said defendant, his executors, administrators, or assigns, to enter upon the said premises thereinbefore agreed to be demised, or any part thereof, and to distrain for so much of the said yearly rent as should be in arrear, and the distress and distresses then and there found to take, carry away, and impound, and otherwise to act therein in such or the like manner as he or they might have done if the said lease had actually been granted."

The first count of the declaration stated, that, before and at the time of committing the grievances by the defendant as thereafter next mentioned, the defendant held and enjoyed a certain messuage, cottage, and premises, situate in the parish of *St. George, Hanover Square*, in the county of *Middlesex*, as tenant thereof to one *John Harrison*, at and under a certain yearly rent, to wit, the yearly rent of 250*l.*; and that, whilst the defendant was such tenant to the said *John Harrison*, and before and at the time of committing the grievances thereafter next mentioned, and before the said *John Nicholles* became a bankrupt, to wit, on the 21st *October*, 1829, to wit, at &c., the said *John Nicholles*, at the special instance and request of the defendant, had become and was tenant to the defendant of the said messuage, cottage, and premises, with the appurtenances, at and under a certain yearly rent, to wit, the yearly rent of 250*l.*, payable to the said defendant quarterly, on &c., &c.; and thereupon it then and there became and was the duty of the defendant, so long as the defendant continued such tenant to the said *John Harrison*, and so long as the said *John Nicholles* continued such tenant to the defendant, to pay the said first-mentioned rent to the said *John Harrison*, and to indemnify and save harmless the said *John Nicholles*

from and against the payment of any of the said rent so payable to the said *John Harrison* over and beyond the amount of the said rent so payable to the defendant as aforesaid, which might be due and in arrear from the said *John Nicholles* to the defendant, and from and against any distress, or costs, damages, or expenses which should or might be made arise or happen to the said *John Nicholles*, for or by reason of the non-payment thereof: and although the said tenancy of the said *John Nicholles* to the defendant was and continued for a long time until and after the committing of the grievances thereafter next mentioned, and although a small sum only, to wit, the sum of 84*l.* 17*s.* 10*d.* of the rent aforesaid, was due and in arrear from the said *John Nicholles* to the defendant at the time of committing the grievances thereafter mentioned, yet the defendant, not regarding his duty aforesaid, but contriving and fraudulently intending to injure and defraud the said *John Nicholles* in this behalf before he became bankrupt, and the plaintiffs as assignees as aforesaid after he became bankrupt, did not nor would during the continuance of the said tenancies pay the first-mentioned rent to the said *John Harrison*, or save harmless or indemnify the said *John Nicholles* according to his said duty, but wholly neglected so to do; and, by reason thereof, during the continuance of the said tenancies, and before the said *John Nicholles* became bankrupt, to wit, on the said 21st October, 1829, at &c. aforesaid, a certain distress was made by and on the behalf of the said *John Harrison* on divers goods and chattels of the said *John Nicholles*, to wit, &c., of great value, to wit, of the value of 400*l.*, then in and upon the said messuage, cottage, and premises, for a certain sum of money, being in amount much over and beyond the amount of the said rent so due and in arrear from the said *John Nicholles* to the defendant, to wit, the sum of 125*l.*, then due and in arrear from the defendant to the said *John Harrison* for and in respect of the said rent so

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payable to him as aforesaid; and the said *John Harrison* afterwards, to wit, on the day and year last aforesaid, at &c. aforesaid, sold the said goods and chattels as such distress as aforesaid, for and towards payment and satisfaction of the said rent so due and owing to him from the defendant, and of the costs and charges of the said distress and incidental thereto; and the said *John Nicholles* before his bankruptcy was, and the plaintiffs, as assignees as aforesaid, since his bankruptcy, have been and are much prejudiced, injured, and damnified by means of the premises, to wit, at &c. aforesaid.

The second count was in substance the same as the first; the third was for taking an excessive distress, the fourth, for an unreasonable distress; the fifth, for not leaving the surplus in the hands of the sheriff or under-sheriff; the sixth and seventh counts were for another distress on the 27th October, 1829, for 62*l.* 10*s.* arrears due from the defendant to *Harrison*. The eight count charged the defendant with having, on the 27th October, 1829, caused the goods of the bankrupt to be distrained for 62*l.* 10*s.*, when no rent was due from him to the defendant. There were several other counts varying the charge; and also a count in trover for the goods.

The defendant pleaded the general issue.

The cause was tried before Lord Chief Justice *Tindal*, at the Sittings in *London* after last *Michaelmas* Term. The facts were as follow:—

The defendant held the premises in question under a lease from *Harrison*, dated the 31st August, 1824, at the yearly rent of 250*l.* On the 21st October, 1829, *Harrison*, the ground landlord, distrained the goods of the bankrupt for a half year's rent due to him from the defendant on the preceding 24th of June. The goods seized on this occasion were appraised and sold for 154*l.* 10*s.* On the 27th October, a further distress was made by *Harrison* for 62*l.* 10*s.*, for a quarter's rent due on

the 29th *September*; and on the same day the defendant himself also distrained for a quarter's rent. The goods seized to satisfy these last distresses were not removed, the money being paid by the bankrupt.

The bankrupt had been let into possession of the premises on the 10th *September*, 1828; consequently, at the time of the *first* distress by *Harrison*, a year's rent had accrued, of which he had paid to the defendant, in cash, 105*l.*, and, for taxes and rates due before his tenancy commenced, 53*l.*, leaving a balance due to the defendant for rent, of 92*l.* only.

The commission under which *Nicholles* was declared a bankrupt was issued on the 27th *October*, 1829. The plaintiff, as assignees, by the action, sought to recover from the defendant damages for the injury alleged to have been sustained by the estate of the bankrupt in consequence of the wrongful distresses under which his property had been taken.

On the part of the defendant, it was objected—*first*, that there was no proof of the relation of landlord and tenant existing between the defendant and *Nicholles*, the agreement being merely executory, and not an actual demise—*secondly* that there was no such *implied* duty in the defendant as that alleged in the declaration, the agreement containing an *express* contract between the parties, and consequently that the action should have been *assumpsit*, founded upon that contract, and not case—*thirdly*, that this right of action did not pass to the assignees, it being merely personal in its nature.

His Lordship reserved these points for the consideration of the Court; and told the jury, that, if the defendant, at the time of the first distress by *Harrison*, had received from the bankrupt something in satisfaction of the half-year's rent for which the distress was made, he was bound to protect the bankrupt from such distress, and was liable for the damages resulting to his estate therefrom;

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and that, if they were of opinion that the defendant had been satisfied, the measure of damages for that distress was not to be limited to the 125*l.*, but that they must give the plaintiffs such reasonable sum as they conceived the goods would have produced if sold by the plaintiffs. With respect to the second distress by *Harrison*, his Lordship told them that the defendant was not answerable for that, as it was not occasioned by him; and, as to the third, that the defendant was only liable for the excess beyond the amount of rent actually due from the bankrupt.

The jury returned a verdict for the plaintiff—damages, 456*l.* 16*s.* 8*d.*

Mr. Serjeant *Jones*, in the last term, obtained a rule nisi that this verdict might be set aside, and a nonsuit entered, or a new trial had, upon the grounds urged at the trial: or that the damages might be reduced.

Mr. Serjeant *Wilde*, and Mr. Serjeant *Spankie* now shewed cause.—

By the agreement under which the bankrupt was let into possession of the premises, the defendant covenanted to execute to *Nicholles* a lease of the premises, “of which possession had been or was intended to be given that day” to *Nicholles*; and the bankrupt covenanted to accept the lease and to execute a counterpart, and, in the mean time, and until the lease should be granted, pay the yearly rent thereby reserved, and perform and keep all the covenants on his part to be kept: with a proviso, that, in case the rent should be in arrear, the defendant should have power to distrain for such arrear (*a*). The defendant having acted upon the agreement, and availed himself of the power of distress, is estopped from contending that the relation of

(*a*) See *Doe d. Pearson v. Ries*, *ante*, p. 259, and the authorities there cited.

landlord and tenant was not thereby created between himself and the bankrupt.

The covenant for quiet enjoyment is incident to every demise. It is the duty of the lessor to protect the lessee from the consequences of his own default. This is an obligation that necessarily results from the contract. And with respect to the form of the action, the case of *Burnett v. Lynch* (a) is a distinct and decisive authority. It was there held that *case* lies by the assignor against the assignee of a lease assigned by deed-poll, upon his implied duty to perform the covenants in the original lease, although the assignor had by the assignment parted with all his interest; and that, although *assumpsit* might lie, *case* was the better form of action for the injury sustained by the assignor in consequence of the assignee's breaches of covenant.

The gist of this action is, that the estate of the bankrupt has been injured by the default of the defendant. Every thing that is beneficial to the bankrupt passes to his assignees, save only rights of action for damages for injuries strictly personal. In the present case, the property of the bankrupt has been by the misconduct of the defendant deteriorated and intercepted from coming to the assignees. The statute 4 *Edw.* 3, c. 7, gave to executors the right of bringing actions relating to the personal estate of their testators; and all rights of action have been held to pass by that statute except for mere injuries to the person of the testator. In *Smith v. Coffin* (b), Lord Chief Justice *Eyre* said: "The policy is, that every right belonging in any shape to the bankrupt should pass to his assignees." And Mr. Justice *Buller* said; "The Court is bound to construe the bankrupt laws in the most liberal and beneficial manner for the creditors. I therefore hold that every species of right of which by any possibility pro-

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(a) 8 Dow. & Ryl. 368; S. C. 5 Barn. & Cress. 589. (b) 2 H. Blac. 463.

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fit can be made, passes to the assignees." By virtue of the 12th and 63rd sections of the statute 6 *Geo. 4*, c. 16, every right connected with the personal property of the bankrupt is conveyed to his assignees. The bankrupt could not release a right of action like the present.

Mr. Serjeant *Jones*, in support of his rule.—This action pre-supposes a present demise, and an obligation of indemnity arising from the relation between the parties of landlord and tenant; whereas, the contract is merely executory, and does not amount to a present demise. The agreement speaks of a future demise by indenture, which was not to be executed until full payment by the lessee of the purchase-money agreed upon. It is clear, that, until the relation of landlord and tenant was consummated, no such duty could arise as that set out in the declaration. The only proper remedy the bankrupt could have had for any breach of the agreement on the part of the defendant, would be in *assumpsit* upon the instrument, in the same manner that covenant would have lain if the lease had been perfected. Where there is an express contract, no implied contract can arise: the form of action therefore should have been *assumpsit* upon the agreement, instead of *case* upon an implied duty arising therefrom. At all events, the payment of rent by the bankrupt was a condition precedent to the attaching of any covenant, either express or implied, for quiet enjoyment. The distress was made in virtue of the convention between the parties; and therefore that circumstance does not admit the relation and the consequent duty expressed in the declaration.

The 12th and 63rd sections of the 6 *Geo. 4*, c. 16, do not contain words sufficiently comprehensive to pass an interest of this description. The statute nowhere speaks of *damages*. The words of the 12th section are—"all such interest in any lands, tenements, and hereditaments,

as the bankrupt may lawfully depart withal, and all his money, fees, offices, annuities, goods, wares, merchandize, and debts:" and those of the 63rd section are—"all the present and future personal estate of the bankrupt, and all property which he may purchase, or which may revert, descend, be devised or bequeathed, or come to him before he shall have obtained his certificate, and all debts due or to be due to the bankrupt."

The damages given were grossly disproportionate to the injury complained of.

Lord Chief Justice TINDAL.—It appears to me that this rule ought to be discharged.

The first objection urged on the part of the defendant is, that there is an allegation on the record of a demise made by the defendant to the bankrupt, *Nicholles*, and that the evidence offered in support of that allegation failed, for that there was no subsisting relation of landlord and tenant between them. Now, the evidence brought forward to support the allegation in question was an agreement bearing date the 10th *September*, 1828; and undoubtedly, in the main purport of it, that appears to be an executory agreement. Part of that agreement was, that, after payment by the bankrupt for the furniture, the demise was to be by an indenture: but, on the other hand, *Nicholles* was to have possession, and the rent was to run, from the period when the agreement was entered into; and the agreement contained all the terms and conditions of the holding. It appears to me to be impossible to say that these express stipulations are to be gainsaid by the executory part of the instrument. It is sufficient to say that this construction arises upon the agreement, *vis.* that, in the interval between the 10th *September*, 1828, and the time at which *Nicholles* would have been in a situation to demand a lease by indenture, the relation of landlord and tenant did exist. Rent was to be paid *eo nomine*.

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If, indeed, any doubt arose upon the construction of the agreement itself, the defendant has put an end to that doubt by the distress put in by him on the 27th *October*, 1829, for the rent then due; for, there could be no legal distress unless the relation of landlord and tenant subsisted between the parties. A distress has been held to be bad where the agreement for a tenancy was only executory (a). It seems to me therefore that the allegation which appears in the declaration, that the defendant was landlord and the bankrupt tenant of the premises in question, was sufficiently made out by the evidence.

The second objection is, that, admitting the existence of the relation of landlord and tenant between the parties, there cannot be any such implied duty on the part of the landlord as is alleged. The allegation of duty is, that it was the duty of the defendant, "so long as the defendant continued tenant to *Harrison* (the superior landlord), and so long as *Nicholles* continued tenant to the defendant, to pay rent to *Harrison*, and to indemnify and save harmless *Nicholles* from and against the payment of any of the rent so payable to *Harrison* over and beyond the amount of the rent payable to the defendant, which might be due and in arrear from *Nicholles* to the defendant, and from and against any distress, or costs, charges, damages, or expenses which should or might be made arise or happen to *Nicholles* for or by reason of the non-payment thereof." It seems to me that that is no more than one of the necessary covenants a landlord enters into with his tenant for quiet enjoyment. It was held in *Burnett v. Lynch*, a case very similarly circumstanced with the present, that there is an implied duty in the assignee of a lease, to perform all the covenants of the lease under which

(a) See *Hegan v. Johnson*, 2 *nett*, 11 J. B. Moore, 222; *S. C.* Taunt. 148—*Dunk v. Hunter*, 5 3 Bing. 361.
Barn. & Ald. 322—*Knight v. Ben-*

his landlord holds. Now, I do not see any ground why, if there is such implied duty on the part of an assignee, there is not correlatively the like duty in the assignor.

It has been argued that the action should have been *assumpsit*, and not case. But the case just referred to is also an authority to shew, that, although *assumpsit* might lie, case is the better form of action.

The next objection is, that the right of action in the present instance, if any exist, is not of a nature to pass to the assignees under the assignment from the commissioners. Undoubtedly there is a large class of actions in which the assignees of a bankrupt cannot put the law in force. Rights of action for injuries to the person of the bankrupt do not form the subject-matter of the assignment contemplated; neither does a right of action for slander or for a libel pass by the assignment. But it seems to me that we should be giving a very inadequate interpretation to the words of the statute 6 Geo. 4, c. 16, if we were to hold that the assignees cannot maintain an action for a wrongful deterioration in value of property coming to them by the assignment. The words of the 12th and 63rd sections of the act are very general. The 12th section enacts—"That the Lord Chancellor shall have power, upon petition made to him in writing against any trader having committed any act of bankruptcy, by any creditor or creditors of such trader, by commission under the Great Seal, to appoint such persons as to him shall seem fit, who shall, by virtue of this act, and of such commission, have full power and authority to take such order and direction with the body of such bankrupt as hereinafter mentioned, as also with all his lands, tenements, and hereditaments, both within this realm and abroad, as well copy or customaryhold as freehold, which he shall have in his own right before he became bankrupt, as also with all such interest in any such lands, tenements, and hereditaments as such bankrupt may lawfully depart withal, and with all

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his money, fees, offices, annuities, goods, wares, merchandize, and debts, wheresoever they may be found or known, and to make sale thereof in manner hereinafter mentioned, or otherwise order the same, for satisfaction and payment of the creditors of the said bankrupt." And the 63rd section enacts—"That the commissioners shall assign to the assignees, for the benefit of the creditors of the bankrupt, all the present and future personal estate of such bankrupt, wheresoever the same may be found or known, and all property which he may purchase, or which may revert, descend, be devised or bequeathed, or come to him before he shall have obtained his certificate; and the commissioners shall also assign as aforesaid all debts due or to be due to the bankrupt, wheresoever the same may be found or known: and such assignment shall vest the property, right, and interest in such debts in such assignees, as fully as if the assurance whereby they are secured had been made to such assignees." When the assignment is to be of all the personal estate of the bankrupt, why are the assignees to be excluded from the right to recover compensation for an act whereby the property of the bankrupt has come to their hands in a less valuable condition than it otherwise would have done? The case of executors is analogous. They may bring an action for an injury done to the property of the testator, though they cannot sue for an injury done to his person or reputation. Many cases might be put where it is obvious that property would come to the assignees in a very deteriorated condition, if such an action as this would not lie.

As to the damages—We are not able to ascertain what was the real value of the goods. The jury were the proper judges of that; and the whole case was before them. We cannot see that the damages they have given are extravagant large.

Mr. Justice PARK.—I agree in opinion with my Lord

Chief Justice upon all the points. The agreement in question was not strictly an executory contract. It is, however, enough to say that the defendant has himself put a construction upon it to conclude himself, by distraining. *Burnett v. Lynch* is entirely in point, both as to the implied duty in the defendant arising out of the contract of demise, and as to the form of the action. All the Judges there say, that, although *assumpsit* might have lain, case was the better form of action.

With respect to the last point, I am decidedly of opinion that this is such a right of action as will pass to the assignees. Actions relating merely to injuries to the person or reputation of the bankrupt undoubtedly would not pass.

Mr. Justice GASELEE.—I should be at a loss to conceive what would constitute a demise, if the agreement in question do not. The lease by indenture was not to be granted, at all events, for a period of fifteen months. In the mean time the tenant was to hold upon the terms to be contained in that lease.

The objection as to the form of the action is untenable. There are many cases where a party has an election to bring either case or *assumpsit*.

I also think the right of action accruing to the bankrupt out of this transaction, was such a right as would devolve upon his assignees by virtue of the assignment. Under the words "estate and effects," in the statute 5 Geo. 2, c. 30, every thing of a personal nature has been held to pass. The words of the last statute are even more comprehensive.

Mr. Justice ALDERSON concurred.

Rule discharged.

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1832.

Saturday,
May 1st.

An error in a date, or other inaccuracy in a bill of particulars, will not warrant a nonsuit, unless the particular be so framed as to be reasonably calculated to mislead the defendant.

HARRISON v. WOOD.

THIS was an action of *assumpsit* brought by the plaintiff, a traveller, to recover a balance alleged to be due to him from the defendant, a wine-merchant, for salary, and for *disbursements* by him in the course of journies performed for the defendant.

The cause was tried before Lord Chief Justice *Tindal*, at the Sittings in *London* after the last term. The plaintiff proved the employment, and his claim for wages, and also proved that thirty shillings *per* day was a fair and reasonable allowance for travelling expenses in the wine trade. The particular of the plaintiff's demand was as follows:—

John Wood to B. Harrison.

1830,	£.	s.	d.
<i>March. Cash advanced between March 20th and April 1st.</i>	51	9	6
<i>March 29th to September 26th. Salary at £100. per annum.</i>	58	0	0
	<hr/>		
	109	9	6
By cash at sundry times, and payments made by you for me	50	7	7
	<hr/>		
	Balance	£59	4 11
	<hr/>		

It further appeared that the 1st *April* in the particular was by mistake inserted by the attorney's clerk instead of *September*; and that an application had, with the defendant's knowledge, been made to a Judge at chambers to rectify it: it was also proved that the service did not commence until the end of *March*.

For the defendant, it was objected that these disbursements were not recoverable under the description of "cash advanced," and consequently that the 50*l.* 7*s.* 7*d.*, for which the plaintiff had by the particular given the defen-

dant credit, covered the amount that was really due to the plaintiff for salary.

His Lordship thought that the bill of particulars precluded the plaintiff's right to recover, as tending to mislead the defendant; and therefore directed a nonsuit, reserving leave to the plaintiff to move to enter a verdict for 48*l.*, which the jury found to be the amount of damages.

Mr. Serjeant *Wilde* accordingly, in the course of the last term, obtained a rule *nisi*.

Mr. Serjeant *Jones* now shewed cause.—The bill of particulars did not contain a true description of the plaintiff's demand; it was calculated to mislead the defendant: and, from the dates mentioned, the advance of money during the service was in fact excluded.

[Mr. Justice *Alderson* referred to *Millwood v. Walter* (a), where it was held that an erroneous date to a bill of particulars will not preclude the plaintiff's demand, where the date cannot mislead.]

Here, the misdescription affects the character of the alleged payments. The real question is, whether, having failed in proof as to one item on the debit side of the particular, the plaintiff can be permitted to apply the credit exclusively to that item. The sum for which the plaintiff has in this case given the defendant credit, may clearly be set in discharge of any part of the debt inserted in the particular for which the plaintiff proceeds.

Mr. Serjeant *Wilde*, in support of his rule, was stopped by the Court.

Lord Chief Justice TINDAL.—If this question had struck

(a) 2 Taunt. 224. "The bill of particulars must not be made the instrument of that injustice which it is intended to prevent." *Per* Sir *James Mansfield*.

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me at the trial as it does now, I should have reversed the situation of the parties. It appears to me that this bill of particulars does not properly bear the construction contended for on the part of the defendant. The disbursements were in point of fact advances of money made by the plaintiff on the defendant's account. The particulars gave full information to the defendant of the nature of the plaintiff's claim upon him. It is true, the advances were not proved to have been made between the days mentioned in the particular; but the defendant was aware of the mistake in the last date. If, indeed, there had been any doubt, or any possibility of the defendant's being misled by the particular, we should have held the plaintiff bound by it. The evidence, however, clearly shews that he could not have been misled; for, it appeared that the plaintiff and defendant were strangers to each other until the end of *March*, when the agreement between them was entered into: and it could not be supposed that the money had been advanced except in the performance of that agreement. We should frustrate the whole intent, and destroy the utility of the bill of particulars, and convert it into an engine of fraud in the hands of the defendant, were we to allow such captious objections. I am clearly of opinion that this case falls within the meaning (though not within the precise terms) of the case of *Millwood v. Walter*.

With regard to the last point—the supposed admission in the item of credit given to the defendant—that I think at most amounts only to a conditional admission, of which the defendant is not at liberty to take advantage.

Mr. Justice Park.—The only question in these cases is, whether the defendant has been misled by the particular. Here, there was a mere blunder in the date. In *Millwood v. Walter*, it was expressly held that an erroneous date to a bill of particulars will not preclude the plaintiff, if the date

cannot mislead the defendant. So, in *Day v. Bower* (a), it was held, that, if the plaintiff's particular conveys the requisite information to the defendant, however inaccurately it be drawn up, it is sufficient, unless the defendant can shew by affidavit that he has been misled. The like was held in *Davis v. Edwards* (b), though the particular (in debt for rent) described the premises by a wrong parish; it not appearing that any misrepresentation was intended, or that the defendant held more than one parcel of land of the plaintiff, so as to be misled by it.

Mr. Justice GASELEE referred to *Harington v. Macris* (c), where it was held that the plaintiff cannot use one plea of the defendant as evidence of the fact which the defendant denies in another plea; nor can he use a particular of set-off for that purpose, because it is incorporated with the notice of set-off.

Mr. Justice ALDERSON concurred.

Rule absolute (d).

(a) 1 Camp. 69, n.

(b) 3 Mau. & Selw. 380.

(c) 5 Taunt. 228.

(d) Lord Chief Justice Tindal afterwards mentioned a case at the York Assizes, wherein he, as counsel, had objected to a particular which contained a charge for five oxen, when it appeared from the evidence that they were cows; but the objection was overruled.

And see *Tenny d. Gibbs v. Moody*, 10 J. B. Moore, 252, where, in ejectment to recover premises for non-payment of rent, a variance between the amount of rent stated in the particulars of demand of the lessor of the plaintiff, and

the amount proved at the trial to be due, was held to be immaterial. And *Tucker v. Barrow*, 1 Moody & Malkin, 137, where, in an action by assignees of a bankrupt, the declaration stated the cause of action to be money had and received to the use of the bankrupt, and the particulars of demand described it as money had and received to the use of the plaintiffs: and it was held that this was not such a variance as would prevent the plaintiffs from recovering, it not appearing that the defendant could be misled by it.

See also *Lambirth v. Roff*, *post*, p. 597.

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Tuesday,
May 1st.

In an action against sureties (the principal debtor having become bankrupt), a general release of the bankrupt and his property will not render the bankrupt a competent witness for the defendants, they having still a right, in the event of a verdict passing against them, to resort to his estate in the hands of his assignees, in the surplus of which the bankrupt retains an interest.

A release by the bankrupt of his interest in the surplus would, it seems, restore his competency.

PERRYMAN v. STEGGALL and Another.

THIS was an action upon a promissory note for 108*l.* 14*s.* 8*d.*, made by the defendants, as sureties for one *Tucker*, payable to the order of Messrs. *Sylvester & Walker*, and by them indorsed to the plaintiff.

The cause was tried before Mr. Justice *Gaselee*, at the Sittings in *London* after last *Michaelmas* Term. The grounds of defence were, that the original transaction as between *Sylvester & Walker* and *Tucker* was usurious, and that the action was in reality the action of *Sylvester & Walker*, though brought in the name of the plaintiff. To prove the usury, *Tucker* was called. His testimony was objected to on the ground of interest. It appeared that he had been a bankrupt, and was uncertificated, and had taken the benefit of the insolvent debtors' act. It was therefore contended, on the part of the plaintiff, that *Tucker* was incompetent, inasmuch as the defendants, as his sureties, would be entitled to prove the amount of the verdict, if against them, under his commission. The defendants then executed a general release to *Tucker*. It was objected that this release did not restore the competency of the witness, it being a mere personal release, leaving his estate in the hands of the assignees still liable to the defendants' proof. The bills which constituted the original debt had actually been proved by *Sylvester & Walker* under *Tucker's* commission.

The learned Judge admitted the examination of the witness, subject to a motion: and he left it to the jury to say whether or not the transaction was usurious. The jury expressed no opinion upon the question of usury; but returned a verdict for the defendant, saying—"We are not satisfied that *Perryman* is the real plaintiff in the cause."

Mr. Serjeant *Wilde*, in the last *Hilary* Term, obtained a rule *nisi* that this verdict might be set aside, and a new trial had, on the objection urged at the trial.—He referred to *Carter v. Abbott* (a).

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Mr. Serjeant *Andrews* now shewed cause.—He contended that *Tucker* was no party to the note, and did not appear to be interested in the question; and that, at all events, the release made him a competent witness.

Mr. Serjeant *Wilde*, in support of his rule.—*Tucker*, as the principal debtor, would be liable to reimburse the sureties the amount they might be compelled to pay on his account. The release was given to him; his estate in the hands of his assignees was not thereby discharged. He has an interest in the surplus of his estate; and consequently was interested in a suit the event of which might tend to lessen that surplus. In *Carter v. Abbott*, Mr. Justice *Bayley* says (b): “The objection arises out of a false construction of the release. It releases the bankrupt from all claims against him and his lands, goods, &c., and the creditors cannot now insist upon having them; whatever may be called *his* is protected by the release, and would be liable to an execution-creditor. But, as soon as an assignment was made under the commission, all that was *then* the bankrupt’s would go to his assignee, and is no longer the bankrupt’s. The fair and true construction of the release, therefore, is, that it does not relate to things before

(a) 1 Barn. & Cress. 444; S. C. 2 Dow. & Ryl. 575. In an action on the 9 *Anne*, c. 14, brought by the assignee of a bankrupt to recover money lost by the bankrupt at play, the bankrupt, who had obtained his certificate, was called as a witness to prove the loss: it was held that he was incompetent,

but that his competency was restored by three releases—first, by the bankrupt to the assignee—secondly, by all the creditors to the bankrupt—thirdly, by the assignee (who was not a creditor) to the bankrupt.

(b) 1 Barn. & Cress. 447.

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effectually assigned, but to such things as might thereafter come to the bankrupt."

Lord Chief Justice TINDAL.—Under the circumstances of this case, I think *Tucker* was not an admissible witness. He was a bankrupt, and had also obtained his discharge under the insolvent debtors' act. The question is, whether, there being an existing commission, the defendants could not, if they were compelled to pay the debt and costs in this action, prove for the amount under that commission; for, if they could, the bankrupt would clearly be interested in the result of the suit, inasmuch as in one event it would tend to the diminution of the surplus of his estate, and of his allowance out of it. The 52nd section of the statute 6 *Geo.* 4, c. 16, provides for proof by a surety. I therefore think that these defendants might, in the event of a verdict and judgment against them in this action prove the amount under *Tucker's* commission. The bankrupt might have released his interest in the surplus of his estate. If he had done so, he might have been admissible, as far as concerns the bankruptcy. It is not necessary to say anything as to the effect of his discharge under the insolvent debtors' act. Upon the whole I think the rule must be made absolute.

The rest of the Court (with the exception of Mr. Justice GASELEE, who declined expressing any opinion,) concurring—

Rule absolute.

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Wednesday
May 2nd.

WORTHAM and BRAMALL v. MACKINNON.

THE following case was, by an order of the Lord Chancellor, bearing date the 20th *December*, 1831, directed to be submitted for the opinion of this Court:—

“*Elisha Biscoe*, Esq., deceased, was, at the time of the date and execution of his will hereinafter mentioned, and continued thence down to and was at the time of his death, seised of, or otherwise well entitled to certain lands and hereditaments described in the act of parliament hereinafter mentioned, for an absolute estate of freehold and inheritance in fee simple; and the said *Elisha Biscoe*, by his last will and testament in writing, bearing date the 7th day of *November* 1772, which was duly executed and attested so as to pass freehold estates, gave and devised all his estates not settled in jointure nor therein specifically given, to his son, *Elisha Biscoe*, for life, without impeachment of waste, and, after the determination of that estate, by forfeiture or otherwise, he devised the same to *Joshua Smith* and *Thomas James*, and their heirs, in trust to preserve contingent remainders, and, after the decease of his said son, the testator devised the said premises unto the first son of the body of his said son lawfully to be begotten, and to the heirs male of the body of such first son lawfully issuing, remainder to the second, third, and other sons of his said son successively, as they should be in priority of birth, and the heirs male of his and their body and bodies successively; and, for want of such issue, to the only daughter, and, if there should be more than one,

E. B. by his will devised certain estates to his son *J. S.* for life; remainder to the sons of *J. S.* successively in tail, and, for want of male issue, to the daughters of *J. S.*; remainder, in case of the death of *J. S.* without issue, to the testator's after-born sons, and their heirs; remainder to the testator's daughters, as tenants in common, and their heirs, and to the survivor of them in tail; with an ultimate remainder to the testator's own right heirs. The testator's daughters suffered recoveries to the use of *J. S.*; and, by an act of parliament, reciting the will of *E. B.* and the recoveries, the trustees therein named were empowered to sell the devised lands, and to lay out the monies to arise from such sales

in the purchase of land to be settled to such of the uses of the will of *E. B.* as were then existing undetermined and capable of taking effect. *J. S.* had no issue. The trustees sold the devised lands, and invested the produce in the purchase of other land which was conveyed to them by a deed following the terms of the act:—*Held*, that, under this conveyance, the trustees took an estate in fee simple in the lands so purchased.

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to all the daughters of his said son, charged nevertheless (which charge has been since paid off and satisfied, and no longer exists,) with the payment of 2,000*l.* a piece to to each of the said testator's own daughters, and, if either of them should be dead leaving a child, to the child and children of such dying daughter; and, in case of the death of the said testator's son without issue, the said testator gave and devised all his manors, lands, and hereditaments, chargeable as aforesaid, unto the first and other sons which he (the testator) might thereafter have, and the heirs of their respective bodies, in succession, with remainder to the said testator's daughters, as tenants in common, and to the heirs of their respective bodies, and to the survivor of them, in tail, with divers remainders over, and remainder ultimately to the testator's own right heirs.

"*Elisha Biscoe* departed this life on or about the 28th January, 1776, without having revoked or altered his said will, leaving his said son *Elisha Biscoe* in the said will named, and *Ann Biscoe* and *Catherine Frances Biscoe*, his two daughters, his only children, him surviving.

"The said *Ann Biscoe*, some time before the year 1789, intermarried with *Timothy Hare Earle*; and, some time before the year 1794, the said *Catherine Frances Biscoe* intermarried with *Edmund Rolfe* the younger.

"By virtue of indentures of lease and release bearing date respectively the 4th and 5th days of February, 1789, the indenture of release being made or expressed to be made between the said *Elisha Biscoe*, the son, therein described as the only son and heir-at-law, and also a devisee for life named in the last will and testament of *Elisha Biscoe*, Esq., deceased, of the first part, the said *Timothy Hare Earle* and *Ann* his wife, of the second part, *John Pugh* of the third part, and *John Jordan* of the fourth part, and of three common recoveries suffered in

pursuance of the said indenture of release, in the then *Hilary* Term, wherein the said *Timothy Hare Earle* and *Ann* his wife were vouched and vouched over the common vouchee, all that one undivided moiety or equal half part or share which the said *Timothy Hare Earle* and *Ann* his wife were seised of or entitled to in fee tail, or for some good estate of inheritance, in reversion or remainder expectant on the decease and failure of issue of the said *Elisha Biscoe* the son (the whole into two equal parts to be divided, of and in all and singular the several messuages, lands, closes, pieces or parcels of arable, meadow, and pasture grounds and hereditaments, and parts and shares of hereditaments, therein particularly described or referred to, situate in the counties of *Middlesex* and *Bucks*, and in the city of *London* (being part of the freehold estates of the said *Elisha Biscoe* the father, deceased, comprised in his said will, and which were not settled in jointure, nor by the said will specifically devised), and also of and in all and singular other the freehold messuages, lands, tenements, parts or shares, and hereditaments whatsoever, late the estates of the said *Elisha Biscoe*, deceased, situate in the said counties of *Middlesex* and *Bucks*, and city of *London*, which in and by his last will and testament were devised to the said *Elisha Biscoe*, the son, for life, with divers remainders over, was, for the considerations in the said indenture of release expressed, granted, released, and assured to the only use of the said *Elisha Biscoe*, the son, his heirs and assigns for ever.

“By virtue of other indentures of lease and release, bearing date respectively the 11th and 12th days of *June*, 1793, the indenture of release being made or expressed to be made between the said *Elisha Biscoe* the son, of the first part, the said *Edmund Rolfe* the younger and *Catherine Frances*, his wife, of the second part, *James Wortham*, Gent., of the third part, and *Roger Biggins*, of the fourth part, and of three common recoveries suffered in

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pursuance of the said indenture of release of the then *Trinity* Term, wherein the said *Edmund Rolfe* and *Catherine Frances*, his wife, were duly vouched, and vouched over the common vouchee, all that other undivided moiety or equal half part or share which the said *Edmund Rolfe* and *Catherine Frances*, his wife, in her right were seised of or entitled to in fee tail or for some good estate of inheritance in reversion or remainder expectant on the decease and failure of issue of the said *Elisha Biscoe*, the son, the whole into two equal parts or shares to be divided of and in (among other hereditaments) all and singular the same messuages, lands, closes, pieces or parcels of arable, meadow, and pasture ground, tenements, and hereditaments, in the aforesaid indentures of lease and release of the 4th and 5th days of *February*, 1789, described or referred to, and also of and in all and singular other the freehold messuages, lands, tenements, parts or shares, and hereditaments whatsoever, late the estate of the said *Elisha Biscoe*, deceased, situate in the said counties of *Middlesex* and *Bucks*, and in the said city of *London*, which in and by his last will and testament were devised to the said *Elisha Biscoe*, the son, for his life, with divers remainders over, was, for the considerations in the last-mentioned indenture of release expressed, granted, released and assured to the only use of the said *Elisha Biscoe*, the son, his heirs and assigns for ever.

“ An act of parliament was made and passed in the 34th year of *George* the Third, intituled ‘ An act for empowering trustees to convey to Sir *Joseph Banks*, Baronet, a part of the settled estates of *Elisha Biscoe*, Esq., pursuant to his contract for the purchase thereof, and to sell or exchange other parts of the said settled estates, and to lay out the money arising from the sales in the purchase of other lands, to be settled, as well as those taken in exchange, to the uses of the estates that shall be so sold or exchanged;’ which recited, among other things, to the ef-

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fect hereinbefore stated, and especially the will of the said testator and the said common recoveries suffered by the said daughters of the said testator, and their husbands, and the said indentures of the 4th and 5th *February*, 1789, and of the 11th and 12th of *June*, 1793, and which also recited, that, by an indenture bearing date on or about the 30th day of *July*, 1791, and made or expressed to be made between the said *Elisha Biscoe*, the son, of the one part, and Sir *Joseph Banks*, Baronet, of the other part, the said *Elisha Biscoe*, the son, did demise to the said Sir *Joseph Banks* a certain messuage and lands at *Smallbury Green*, in the said county of *Middlesex*, part of the messuages, lands, and hereditaments devised by the said will and comprised in the aforesaid indentures of lease and release, for the term of twenty-one years, at the yearly rent of 200*l.*; and it was thereby provided, declared, and agreed, by and between the said parties thereto, that, when and so soon as the said *Elisha Biscoe* should be enabled to make out a proper, good, and sufficient title to the fee simple and inheritance of the premises thereby demised free from incumbrances, that then it should and might be lawful to and for the said Sir *Joseph Banks*, his executors or administrators, to become the purchaser thereof at or for the price or sum of 6,000*l.*, provided such purchase should take place within three years from the commencement of the said demise; and the said Sir *Joseph Banks* did thereby, for himself, his executors and administrators, covenant, promise, and agree to and with the said *Elisha Biscoe*, his heirs and assigns, that he, the said Sir *Joseph Banks*, his executors or administrators, should and would in such case become the purchaser thereof at or for the price aforesaid; and which recited that the said *Elisha Biscoe*, the son, was then unmarried, and had not any issue; and the said act further recited, in the words and figures following (that is to say) ‘ And whereas the several limitations created by the said in part recited will of the said *Elisha Biscoe*, de-

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ceased, and expectant on the failure of issue of his daughters, the said *Ann Earle* and *Catherine Frances Rolfe*, of and in such of the several messuages, lands, and hereditaments thereby devised as are situate in the aforesaid counties of *Middlesex* and *Bucks*, and city of *London*, and are or are intended to be specified or set forth in the schedules hereunto annexed, are barred and destroyed by the recoveries which the said *Timothy Hare Earle* and *Ann* his wife, and *Edmund Rolfe* the younger and *Catherine Frances* his wife, are hereinbefore mentioned to have respectively suffered; and the said *Elisha Biscoe*, the son, is now seised of the remainder or reversion thereof in fee simple expectant on the failure of issue of his body: And whereas it would be greatly for the benefit of the said *Elisha Biscoe*, the son, and his issue inheritable under the said will of his said late father, if the contract or agreement of the said Sir *Joseph Banks* for the purchase of the said messuage, hereditaments, and premises at *Smallbury Green*, for the sum of 6,000*l.*, were fulfilled, and proper trustees were appointed and authorized to convey the same to him pursuant to his said covenant for the purchase thereof, and also to sell or exchange the remaining part of such last-mentioned devised estates, as well as the said messuages, hereditaments, and premises at *Smallbury Green*, in case the said agreement with the said Sir *Joseph Banks* shall not be fulfilled, and to lay out the monies that shall arise by such sale in the purchase of other lands and hereditaments to be situated in *England*, and to be settled, as well as those which shall be taken in exchange, to such of the uses created by the aforesaid will of the said *Elisha Biscoe*, deceased, as are now existing undetermined or capable of taking effect; but, by reason of the limitations contained in the said will, the purposes aforesaid cannot be effected without the aid and authority of parliament: And it was thereby enacted, among other things, 'that it should be lawful for *Edmund Calamy* and *James Wortham*

and the survivor of them, and the heirs and assigns of such survivor, and they and he were thereby authorized and required, upon payment to them or him by the said Sir *Joseph Banks*, his heirs, executors, administrators, or assigns, of the sum of 6,000*l.*, to convey, surrender, and assure to him, his heirs and assigns, or to such person or persons, and in such manner, as he or they should direct or appoint, all and singular the said capital messuage or mansion house situate at *Smallbury Green* aforesaid, and the grounds, lands, hereditaments, and premises comprised in the said indenture of lease to the said Sir *Joseph Banks*, or intended so to be, with their and every of their rights, members, and appurtenances; and also at any time or times after the passing of the said act, at the request and with the consent and approbation of the said *Elisha Biscoe*, the son, during his life, and after his decease then of such person or persons, being of the age of twenty-one years, as for the time being would, in case the said act had not been made, have been entitled to receive the rents, issues, and profits of the remaining part of the several estates thereby authorized to be sold or exchanged in manner thereafter mentioned, or of such parts of the said estates as it should be intended to sell or exchange; but, if such person or persons should be under the age of twenty-one years, then, at the request and with the consent and approbation of his, her, or their guardian or respective guardians for the time being (such request, consent, or approbation to be testified by writing under the hand or seal, hands or seals, of the person or persons respectively whose consent or consents respectively was or were thereby made necessary, and to be attested by two or more credible witnesses), to sell and dispose of, either together or in parcels, by public auction or private sale or contract, or convey in lieu of or in exchange for other messuages, lands, and hereditaments in *England*, All and singular such of the said devised estates of the said *Elisha Biscoe*, deceased, as were situate

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in the counties of *Middlesex* and *Bucks* and the city of *London*, and specified and described as in the schedule thereunto annexed:’ And it was thereby further enacted ‘that the said Sir *Joseph Banks*, his heirs and assigns, and also all and every the person or persons to whom the said *Edmund Calamy* and *James Wortham*, or the survivor of them, or the heirs or assigns of such survivor, should by virtue and in pursuance of the said act, make any sale, conveyance, or exchange, of the messuages, lands, tenements, and hereditaments thereby authorized to be sold, or any part or parts thereof, and the respective heirs, executors, administrators, and assigns of such purchaser or purchasers, or the person or persons with whom any exchange or exchanges should be made as therein aforesaid, should, from and immediately after payment of his or their respective purchase-money, or the money to be paid on any such exchange, and the execution and delivery of the conveyances or assurances of the lands, tenements, and hereditaments so to be by him or them purchased or conveyed in exchange as aforesaid, have, hold, and enjoy all the hereditaments to be by him or them respectively purchased or had in exchange (except nevertheless the payment of the aforesaid sum of 2,000*l.* a piece to the said *Ann Earle* and *Catherine Frances Rolfe*, the daughters of the said *Elisha Biscoe*, deceased, respectively, and their respective children, absolutely freed and discharged of, from, and against all the uses, trusts, estates, limitations, charges, powers, provisions, and declarations in and by the therein in part recited will of the said *Elisha Biscoe*, deceased, particularly or by reference limited, expressed, or declared of or concerning the same hereditaments, or any part or parts thereof:’ And it was thereby further enacted ‘that *Edmund Calamy* and *James Wortham*, and the survivor of them, and the heirs and assigns of such survivor, should stand and be possessed of and interested in the monies which should arise by such sale or sales, or exchange or

exchanges as in the said act mentioned, upon trust that they the said *Edmund Calamy* and *James Wortham*, and the survivor of them, and the heirs, executors, or administrators of such survivor, by, with, and out of the same, should, in the first place, defray the costs, charges, and expenses of soliciting, applying for, and obtaining the act now in recital, and of making and completing the sale or sales, or exchange or exchanges directed to be made, or otherwise to be occasioned in carrying the trusts of the said act into execution, and, in the next place, should, at such request, and with such consent, and to be testified in such manner as was thereinbefore made requisite on every of such sale or exchange, lay out and invest the residue or surplus and overplus of the monies to arise by such sale or sales, exchange or exchanges as therein mentioned, in the purchase of freehold lands, tenements, and hereditaments of a good estate of inheritance in fee simple in possession, or of such customary, copyhold, or leasehold lands and premises as should be adjoining thereto, or be proper or convenient to be held therewith, to be situate somewhere in that part of *Great Britain* called *England*, and to be free from incumbrances (except chief and quit rents and services) and should convey, surrender, settle, and assure the lands and other hereditaments so to be purchased, or cause or procure the same to be conveyed, surrendered, settled, and assured to such of the uses, upon and for such of the trusts, intents, and purposes, and with, under, and subject to such of the powers, provisos, declarations, and agreements in and by the said in part recited will of the said *Elisha Biscoe*, deceased, particularly or by reference limited, declared, contained, or mentioned of and concerning the messuages, lands, and hereditaments thereby respectively devised, or intended so to be, and by the said act authorized to be sold or exchanged as thereinbefore mentioned, as then were, or at the time of making such sale or sales, exchange or exchanges, assurance or assur-

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ances as in the said act mentioned, should be existing undetermined or capable of taking effect, or as near thereto as the nature and qualities of the estates so to be purchased or had in exchange would then admit of.' And it was thereby further enacted, 'that, until such sales, conveyances, exchanges, and assurances should be respectively made and executed, the said hereditaments, or so much of them as should not be sold or exchanged, should be held and enjoyed, and the rents, issues, and profits thereof received and taken, by and for the benefit of such person or persons who would have been entitled to and ought to have received the same in case the said act had not passed.' And the last clause of the said act was in the following words—'Saving always to the King's most excellent Majesty, his heirs and successors, and the said *Timothy Hare Earle* and *Ann* his wife, and their children, and the said *Edmund Rolfe* the younger and *Catherine Frances* his wife, and their children, in respect of the aforesaid sums of 2,000*l.* and 2,000*l.* only, and all and every person or persons, bodies politic or corporate, his, her, and their respective heirs, successors, and executors and administrators (other than and except the said *Elisha Biscoe*, the son, and his heirs, and the heirs of the body of the said *Elisha Biscoe*, the son), all such estates, rights, titles, claims, and demands whatsoever, of, in, to, or out of the messuages, lands, and hereditaments hereby authorized to be sold or exchanged as aforesaid, or any part or parts thereof, as they or any of them had before the passing of this act, or could or might have had or enjoyed in case the same had not been made.'

"The said sums of 2,000*l.* were afterwards paid and satisfied, and ceased to be a charge on any part of the said lands.

"In pursuance of the said act of parliament, several of the estates so devised by the will of the said *Elisha Biscoe* the elder as aforesaid, were sold in the manner thereby di-

rected, by the trustees in the said act named, or the survivor of them, and the purchase-money for the same was paid to the trustees or the survivor of them.

“ The said *Edmund Calamy* departed this life on or about the — day of —, leaving the said *James Wortham* him surviving.

“ A short time previous to 1817, the said *James Wortham*, at such request and with such consent and approbation, and so testified as by the said act made requisite, contracted to lay out certain monies, being part of the monies arising from the before-mentioned lands, in the purchase of a freehold estate called the *Filcombe* estate, situate in *Berkshire*, and, in pursuance of such contract, by indentures of lease and release, bearing date the 26th and 27th days of *March*, 1817, and made between *James Payn* of the first part, *Edward Morgan* of the second part, *Cuthbert Johnson* of the third part, the Reverend *Samuel Lowe* of the fourth part, *Ambrose Humphreys* of the fifth part, *William Osborne*, the said *Edward Morgan*, *Mary Theresa Hassall* and *William Bartlett*, of the sixth part, *James Morris* of the seventh part, *John Mackaness* of the eighth part, the said *James Wortham* of the ninth part, and the said *Elisha Biscoe* of the tenth part—reciting, among other things, the said will of the said testator, the said indentures of the 4th and 5th *February*, 1789, and of the 11th and 12th of *June*, 1793, and the aforesaid common recoveries, and the said hereinbefore mentioned act of parliament; and that several of the hereditaments comprised in the said recited act of parliament, and thereby directed to be sold by the said *Edmund Calamy* and *James Wortham* as aforesaid, had been accordingly sold by them; and that the several hereditaments thereafter expressed to be thereby released, and so contracted to be sold to the said *James Wortham* as therein aforesaid, were so contracted to be sold to him as surviving trustee acting by virtue of or under the said act of parliament, and at the

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request and with the consent and approbation of the said *Elisha Biscoe*—in consideration of the sum of 16,284*l.* paid by the said *James Wortham* as therein mentioned, and for the nominal considerations therein mentioned, the fee simple and inheritance of a certain manor, messuages, lands, tithes, tenements, and hereditaments, in the now reciting indenture particularly described, being the premises so contracted to be purchased, and denominated the *Fitcombe* estate, was bargained and sold, granted, released, confirmed, and assured to the said *James Wortham*, his heirs and assigns, To hold the same to the said *James Wortham*, his heirs and assigns, to such of the uses, and upon and for such of the trusts, intents, and purposes, and with, under, and subject to such of the powers, provisos, and declarations in and by the said in part recited will of the said *Elisha Biscoe*, deceased, particularly or by reference limited, declared, contained, or mentioned of and concerning the messuages, lands, and hereditaments thereby devised, or intended so to be, by the said in part recited act of parliament authorized to be sold or exchanged as in the said indenture mentioned, as were then existing undetermined and capable of taking effect.

“ The said *Elisha Biscoe*, by his last will and testament in writing, duly made and executed as by law is required for the passing of freehold estates by devise, bearing date on or about the 26th day of *May*, 1824, and thereby authorized and empowered the said *James Wortham* and *Thomas Bramall* for the purposes therein mentioned, at their discretion, to mortgage, either in fee or for years, or absolutely to sell and dispose of, any part or parts of his real estate, by public auction or private contract, and to make and execute all such acts, deeds, matters, and things as should be requisite to effectuate such mortgage or mortgages, sale or sales, and, subject and charged as therein mentioned, and subject to the powers thereinbefore contained, he gave and devised all and singular his

freehold, copyhold, and leasehold manors, advowsons, messuages, farms, lands, rents, tithes, tenements, estates, hereditaments, and premises whatsoever and wheresoever, unto and to the use of the said *James Wortham* and *Thomas Bramall*, their heirs and assigns for ever, upon certain trusts therein mentioned.

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“ The last-mentioned testator, *Elisha Biscoe*, the son, died shortly afterwards, without having revoked or altered his said will: and the said *James Wortham* and *Thomas Bramall* proved the said will, and accepted the devises therein contained.

“ It was necessary, for the purposes in the will expressed, that the real estates of the said *Elisha Biscoe*, the son, should be sold.”

The question for the opinion of the Court was—

“ What estate had the said *James Wortham* and *Thomas Bramall* in, and what power had they over, the lands, hereditaments, and premises conveyed and assured as aforesaid by the said indentures of the 26th and 27th *March*, 1817.”

The case did not state whether or not *Elisha Biscoe*, the son, died without issue; but, on its coming on for argument, it was agreed that the fact was so.

Mr. Serjeant *Coleridge*, for the plaintiffs.—The only question is what uses were existing undetermined and capable of taking effect at the time of the making this act of parliament and conveyance. The enacting part of the act authorizes the sale, and directs that the money to arise from such sale shall be laid out in the purchase of other lands and hereditaments, to be settled to such of the uses created by the will of *Elisha Biscoe*, deceased, as were then existing undetermined and capable of taking effect: and the conveyance of *March*, 1817, follows the words of the act. The estates tail of the daugh-

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ters of *Elisha Biscoe* the elder were completely barred by the recoveries before the passing of the act; and it cannot be said that the act intended to re-create them. The recitals of the act shew that those estates were considered to be at an end. The saving clause only refers to the charges of 2,000*l.* each to *Earle* and wife and *Rolfe* and wife, and their respective issue. The act was passed (as appears from the recital) for the benefit of *Elisha Biscoe*, the son, and his issue. The money with which the estates were to be purchased could not go to the testator's daughters; it would therefore be absurd to say that the estates themselves should. In order properly to understand the meaning of the act of parliament, regard must be had to the state of the property at the time of its passing. *Elisha Biscoe*, the son, had then an estate in fee, subject to the contingency of his having issue. He died without issue: consequently the plaintiffs took an estate in fee simple in the lands conveyed by the indentures of the 26th and 27th of *March*, 1817.

Mr. Serjeant *Taddy*, *contra*.—The question arises merely upon the construction of a deed; for, a private act of parliament is only a more solemn and more formal mode of conveyance than that by means of an ordinary deed: and the Court must give effect to the operative words of the conveyance, and are not to be controlled by a dubious intention to be drawn from the recitals. This is well exemplified by the late case of *Lord Cholmondley v. Clinton* (a), where *A.*, in a conveyance to uses, settled an estate for life on himself, remainder in tail to his issue, with an ultimate limitation to the heirs of *S. R.* in fee, and, at the time of the settlement, *A.* was himself the right heir of *S. R.*: it was held (Mr. Justice *Bayley* dissenting) that it was not competent to go into the intention of the settlor, apparent from the recital, in order to explain the words of the limitation; they

(a) 2 Barn. & Ald. 625.

being words of plain and well known import. And in the report of that case in equity (a), it was held, that, where a limitation in a deed is perfect and complete, it cannot be controlled by intention collected from other parts of the deed. The words of the operative part of the deed in the present case are, that the property should be settled—"to such of the uses, and upon and for such of the trusts, intents, and purposes, and with, under and subject to such of the powers, provisos, and declarations, in and by the said in part recited will of the said *Elisha Biscoe*, deceased, particularly or by reference limited, declared, contained, or mentioned, of and concerning the messuages, lands, and hereditaments thereby devised, or intended so to be, by the said in part recited act of parliament authorized to be sold or exchanged as in the said indenture mentioned, *as were then existing undetermined and capable of taking effect.*" By the terms of the original will, *Elisha Biscoe*, the son, was tenant for life; remainder in strict settlement to his sons and daughters respectively in tail; remainder to the testator's after-born sons, and their heirs in succession; remainder to the testator's daughters as tenants in common; with divers remainders over; and remainder ultimately to the testator's own right heirs. The act of parliament recites that the several limitations created by the said in part recited will, and expectant on the failure of issue of the daughters, are barred and destroyed by the recoveries which had been suffered, and that the said *Elisha Biscoe*, the son, was seised of the remainder or reversion thereof in fee simple expectant on the failure of issue of his body. Suppose the intention had been to revive the whole of the uses of the will, could words more explicit than those contained in this deed have been used? The effect of a common recovery is, to raise a new estate; but, to many purposes, the antient uses remain. In *Abbott v. Burton* (b), where *H.*, being seised of lands *ex parte*

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(a) 2 Jac. & Walk. 84.

(b) 2 Salk. 500.

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materna, by a deed to declare the uses of a recovery, limited several estates, with remainder to the use of his right heirs, it was holden that the heirs *ex parte materna* should have it, being the antient use. The recoveries here applied only to a small portion of the property mentioned in the act of parliament. In construing deeds, a legal meaning must be given to legal words. *Phillips v. Deakin* (a).

Mr. Serjeant *Coleridge*, in reply.—The only difference between the construction of a deed and that of a will is, that the former is construed with rather more strictness than the latter; in both, however, effect must be given to the manifest intention of the parties. In the present case it is clear that the estates barred by the recoveries are non-existing, and therefore incapable of taking effect.

The following certificate was afterwards sent:—

“We have heard this case argued by counsel, and have considered it; and we are of opinion that the plaintiffs, *James Wortham* and *Thomas Bramall*, took an estate in fee simple in the lands, hereditaments, and premises conveyed and assured by the indentures of the 26th and 27th of *March*, 1817.

N. C. TINDAL.

J. A. PARK.

S. GASELEE.

E. H. ALDERSON.”

(b) 1 Mau. & Selw. 744. Devise to the use of the testator's daughter for life, remainder to her first and other sons in tail male, remainder to her daughters in tail generally, with like remainders to his niece, her sons and daughters, severally and successively; and, for default of such issue, to such of the uses,

for such of the intents, and subject to such limitations declared by the will of *T. V.* as shall be then existing undetermined or capable of taking effect, or as near thereto as the deaths of parties and other intervening accidents and contingencies, and the rules of law and equity, will then admit:

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DIGBY v. ALEXANDER.

Wednesday,
May 2nd.

THIS was an action of *assumpsit* upon a bill of exchange for 267*l.* 4*s.* 2*d.*, bearing date the 24th *December*, 1830, drawn by one *John Tyrrell*, at two months' date, payable to his own order, upon the defendant, describing him as "the right Honorable the Earl of *Stirling*," accepted by the defendant by the name or title of "*Stirling*," and indorsed by *Tyrrell* to the plaintiff. The declaration was of *Hilary Term*, 2 *Will.* 4.

A plea in abatement, that the defendant, sued as a common person, was a Scotch peer, must distinctly and positively allege him to have been a peer at the time of suing out the writ; the mere statement of circumstances which amount only to evidence of peerage will not suffice.

The defendant craved an imparlance and pleaded as follows:—"And the right Honorable *Alexander*, Earl of *Stirling*, of that part of the United Kingdom of *Great Britain* and *Ireland* called *Scotland*, against whom the plaintiff has issued his writ and declared thereon by the name of *Alexander Humphreys Alexander*, in his own person comes, and, saving to himself all advantages and exceptions, as well to the writ as to the declaration aforesaid, prays leave to imparle thereto, &c., &c.; and the said Earl of *Stirling* says, that, long before the issuing of the writ of the plaintiff in this suit, to wit, on the 20th *April*, 6 *Geo.* 4, the said late King, by his royal proclamation, bearing *teste* at *Carlton House* the day and year last aforesaid, after reciting that *Alexander*, Earl of *Balcarres*, was duly elected and returned to be one of the sixteen peers of *Scotland*, to sit in the House of Peers in the then present parliament of the United Kingdom of *Great Britain* and *Ireland*, and was then since deceased, in order to the electing another peer of *Scotland* to sit in his room, by and with the advice of his Privy Council, issued forth that proclamation, strictly charging and commanding all

it was held that *T. S. V.*, who would have taken a vested remainder in tail, and would then have been tenant in tail in possession under the will of *T. V.*,

did not take any vested estate under the words of reference to the will of *T. V.* during the life of the second testator's daughter.

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the peers of *Scotland* to assemble and meet at *Holyrood House*, in *Edinburgh*, on *Thursday*, the 2nd day of *June* then next, &c., to nominate and choose another peer of *Scotland* to sit and vote in the House of Peers, &c., in the room of the said *Alexander*, Earl of *Balcarres*, deceased, by open election and plurality of voices of the peers that should then be present, and of the proxies of such as should be absent (such proxies being peers, and producing a mandate in writing duly signed before witnesses, and both constituent and proxy being qualified according to law); and the Lord Clerk Register, or such two of the principal clerks of the Sessions as should be appointed by him to officiate in his name, were thereby respectively required to attend such meeting, and to administer the oaths required by law to be taken there by the said peers, and to take their votes, and, immediately after such election made and duly examined, to certify the name of the peer so elected, and to sign and attest the same in the presence of the said peers, the electors, and return such certificate into the High Court of *Chancery of Great Britain*; and the said Lord the late King thereby strictly charged and commanded that that proclamation should be duly published at the Market-Cross at *Edinburgh*, and in all the county towns in *Scotland*, twenty-five days at least before the time thereby appointed for the meeting of the said peers to proceed on such election: And the said Earl of *Stirling* further says, that the said proclamation was afterwards, and more than twenty-five days before the time thereby appointed for the meeting of the said peers to proceed on such election, to wit, on the 6th *May*, 1825, duly published at the Market-Cross at *Edinburgh* aforesaid, and in all the county towns of *Scotland*: And the said Earl of *Stirling* further says, that, afterwards, and long before the issuing the said writ of the plaintiff in this suit, and before the assembly and meeting hereinafter next mentioned, to wit, on the 21st *May*, in the year aforesaid, at *Edinburgh* aforesaid, the

said Lord Clerk Register duly appointed Sir *Walter Scott*, Baronet, and *Colin Mackenzie*, Esq., to be clerks to the meeting so to be held as aforesaid for such election as last aforesaid, and two of the principal clerks of the Sessions, to officiate in his name thereat: And the said Earl of *Stirling* further says, that, afterwards, and before the issuing the writ of the plaintiff in this suit, to wit, on the 2nd June, 1825, divers of the peers of *Scotland*, in obedience to the said proclamation, did assemble and meet at the palace of *Holyrood House, Edinburgh, &c.*, to nominate and choose a peer of *Scotland* to sit and vote in the House of Peers, &c., in the room of the said *Alexander*, Earl of *Balcarres*, deceased; and that the said Sir *Walter Scott* and *Colin Mackenzie*, the said two clerks of Sessions so nominated and appointed as aforesaid, attended the said meeting or assembly and officiated thereat for the purpose aforesaid: And the said Earl of *Stirling* further says, that, at the said assembly or meeting so held as aforesaid, for the purpose of such election as aforesaid, the long or great roll of the peers of *Scotland* was called over, except those who stood attainted of high treason: And the said Earl of *Stirling* further says, that he, *then being Earl of Stirling*, of that part of the United Kingdom of *Great Britain and Ireland* called *Scotland*, attended and was present at the said meeting or assembly, for the purpose of giving his vote as a peer of *Scotland* at and upon the said election; and that, upon the title of Earl of *Stirling* being called, he, the defendant in this suit, claimed to vote, as Earl of *Stirling* and entitled to the honors and dignity of Earl of *Stirling*, and he, the said Earl of *Stirling*, the defendant in this suit, then and there answered to his title of Earl of *Stirling*, and his vote was then and there taken and received by the said Sir *Walter Scott* and *Colin Mackenzie*, the two clerks of the Sessions so nominated and appointed by the Lord Clerk Register as aforesaid, for the purpose aforesaid, and officiating as aforesaid; and he further says that the said Sir

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Walter Scott and *Colin Mackenzie*, the said two clerks of the Sessions so nominated and appointed as aforesaid, and officiating as aforesaid, then and there, at the said meeting or assembly so held as aforesaid for the purpose in that behalf aforesaid, to wit, on the said, &c., in the palace of *Holyrood House* aforesaid, administered to him the said Earl of *Stirling* the oath required by law to be taken by him as a peer of *Scotland*, and took and received his vote at the said election; and that he did, as Earl of *Stirling* as aforesaid, vote at the said election for *James*, Viscount of *Strathallan*, to sit and vote in the House of Peers, &c., in the room of the said *Alexander*, Earl of *Balcarres*, deceased, as by the record of the proceedings at the said election remaining in the General Register Office of our Lord the now King, at *Edinburgh* aforesaid, more fully appears: and the said Earl of *Stirling*, the defendant in this suit, further says that the said Sir *Walter Scott* and *Colin Mackenzie*, the said two clerks of Sessions so nominated and appointed and officiating as aforesaid, immediately after such election made and duly examined, certified the name of the peer so elected, and signed and attested the same in the presence of the peers, the electors, and returned the said certificate into the High Court of *Chancery* of *Great Britain*, as by the record thereof remaining in the said High Court of *Chancery*, at *Westminster*, in the county of *Middlesex*, more fully appears: And the said Earl of *Stirling* further says, that, by virtue of the said election, the said Viscount of *Strathallan*, afterwards, and before the issuing the writ of the plaintiff in this suit, to wit, on the 6th *June*, 1825, took his seat and voted in the House of Peers, &c.: [The plea then set out a proclamation of his present Majesty (as before), bearing date the 24th *July*, 1830, whereby his Majesty commanded the peers of *Scotland* to meet at *Holyrood House* on the 2nd *September* then next ensuing, to choose the sixteen peers, and averred the appointment of *Thomas Thompson* and *Adam Rolland*, Es-

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quires, to be clerks of the meeting, and that the peers met as before.] And the said Earl of *Stirling* further says, that, at the said assembly or meeting so held as last aforesaid, for the purpose of such election as last aforesaid, the long or great roll of the peers of *Scotland* was called over, except those who stood attainted of high treason, and that the name of him, the defendant in this suit, as Earl of *Stirling*, was then and there called as a peer of *Scotland*: And the said Earl of *Stirling* further says, that he did not attend the said last-mentioned meeting, but sent a list signed by him, together with the documents and instruments as by law directed, containing the names of sixteen peers of *Scotland* for whom he intended to vote at the said last-mentioned election, to be nominated and chosen to sit and vote in the House of Peers, &c., to wit, &c., &c.; and he further says that the vote of him the said Earl of *Stirling*, by such signed list, was then and there taken and received by the said *Thomas Thomson* and *Adam Rolland*, the said two clerks so nominated and appointed as last aforesaid, and officiating as last aforesaid, for the said several peers named in the said signed list to sit and vote in the House of Peers, &c., and that all the peers named in the said list were, at the said assembly or meeting so held as last aforesaid, elected, nominated, and chosen to sit and vote in the House of Peers, &c., as by the record of the proceedings at the said last-mentioned election remaining in the General Register Office of our said Lord the now King, at *Edinburgh* aforesaid, more fully appears: And the said Earl of *Stirling* further says, that the said *Thomas Thomson* and *Adam Rolland*, the said two clerks so nominated and appointed, and officiating as last aforesaid, immediately after such election made and duly examined, certified the names of the sixteen peers so elected, and signed and attested the same in the presence of the said peers, the electors, and returned the said certificate into our said Lord the now King's

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High Court of *Chancery of Great Britain*, as by the record remaining in the said High Court of *Chancery*, at *Westminster* aforesaid, more fully appears: *And so the said Earl*, the defendant in this suit, *says that he, before and at the time of the issuing the said writ of the plaintiff in this suit, was, and ever since has been, and still is*, Earl of *Stirling*, of that part of the United Kingdom of *Great Britain and Ireland* called *Scotland*, and by that name and title ever since his vote was so received at the said first-mentioned election has been named and called; without this that he the said *Alexander*, Earl of *Stirling*, now is, or at the time of issuing the said writ of the plaintiff in this suit, was named or called by the name of *Alexander Humphreys Alexander*, as by the said writ and declaration thereon founded is above supposed: And this he is ready to verify; wherefore, inasmuch as he is not sued and named and called, in and by the said writ and declaration thereon founded, in and by this said name and dignity of *Alexander*, Earl of *Stirling*, he prays judgment of the said writ, and of the declaration thereon founded, and that the same may be quashed, &c.

To this plea, the plaintiff demurred generally, and the defendant joined in demurrer.

The case now came on for argument.

Mr. Serjeant *Stephen*, in support of the demurrer.—The plea states nothing more than that, upon two occasions, the defendant voted at the election for Scottish representative peers; not that his vote was effectual. All that the Court decided when this case came before it at an earlier stage, was, that, upon the face of the affidavits, the defendant was sufficiently *de facto* a peer of *Scotland*, and therefore not liable to be arrested (a). To entitle the defendant to abate the writ, he must shew that he is a

(a) See *Digby v. The Earl of Stirling*, *ante*, p. 116; *S. C.* 8 Bing. 55; and see *Cantwell v. The Earl of Stirling*, *ante*, p. 297.

peer *de jure*. The plea, however, does not state sufficient to satisfy the conclusion of law; the consequence assumed does not follow from the premises laid. It is perfectly consistent with all that appears upon the face of the plea, that the defendant's vote was improperly received on the occasions he alludes to. The statute 6 *Anne*, c. 23, s. 3, prescribes certain oaths to be taken by peers on their being admitted to vote: the plea does not aver that the defendant took these oaths; therefore it does not appear that he was eligible to vote. The plea should also clearly shew that the defendant was a peer at the time the writ was sued out; it is not enough to shew that he was so at a precedent period, or has become so since. In the case of *Lott v. Mills* (a), the defendant pleaded in abatement, *quod suscepit ordinem militare, et jam miles existit*; but, inasmuch as it was not averred that he was a knight *tempore exhibitionis billæ*, or after the last continuance, the Court awarded a *respondeat ouster*. Here, the defendant might, for anything that appears upon the plea, have been attainted, or his title might have been extinguished by act of parliament, or, according to the power given by the *Scotch* law, he might have surrendered his peerage. Besides, the plea is bad for duplicity: it states two distinct acts of voting; whereas one would be enough if the act of voting were sufficient to constitute the party a peer *de jure*.

Mr. Serjeant *Taddy*, *contrà*.—The plea sufficiently shews that the defendant is Earl of *Stirling*, and also how he is Earl; and the plaintiff sues upon an instrument which is addressed to the defendant by his title of Earl of *Stirling*. The defendant appears to the action as Earl of *Stirling*, and the plea states that he, "*being* Earl of *Stirling*," voted: that is a sufficient allegation of his peerage. It is enough that on the whole plea, the Court can

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(a) 6 Mod. 105.

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see that the defendant is the person he professes to be. In the Earl of *Banbury's* case (a), upon a motion for a *supersedeas* of a writ of *latitat* sued out against Lord *Banbury* by the name of *Charles Knolls*, the Court said: "If my Lord had ever been summoned to parliament, and had a writ to shew that there was no dispute about the identity of the person, it would have been reasonable to have granted a *supersedeas*; but, in this case of a lord who has never sat there, they could not do it, for they could not try peerage upon a motion; but his lordship might plead it." But no peer of *Scotland*, who is not one of the representative peers, could plead more than is pleaded here. The most antient peers are those who possess no records of their original creation. On the 12th June, 1739, the Lords of Session in *Scotland* were ordered to lay before the House of Lords a roll or list of the peers of *Scotland*, and the particular limitation of each peerage; upon which they made their report, which concluded thus—"The Lords of Session are not able to give your Lordships any reasonable satisfaction touching the limitations of the peerages that are still continuing." This shews the difficulty of proving the original creation of a *Scotch* peer. Lord *Coke* says (b), "A man may have an inheritance in title of nobilitie and dignitie three manner of ways, that is to say, by creation, by descent, and by prescription. By creation, two manner of ordinary wayes (for I will not speake of a creation by parliament), by writ, and by letters patent." "And this writ hath no operation or effect until he sit in parliament, and thereby his blood is ennobled to him and his heirs lineall, and thereupon a baron is called a peer of parliament. And if issue be joined in any action, whether he be a baron, &c., or no, it shall not be tried by jury, but by the record of parliament which could not appear unlesse he were of the parliament. Therefore, a

(a) 2 Lord Raym. 1247.

(b) Co. Litt. 16. a.

duke; earl; &c., of another kingdome, are not to be sued by those names here, for that they are not peeres of our parliament." The plea in the present case does not proceed either on the ground of a creation of peerage by patent, or of a writ to sit in parliament. Before the union, there was no writ by which peers were summoned to serve in parliament. Lord *Kaimes's British Antiquities* (a). *Spottiswoode*, in his *Practices of the Law of Scotland* (b), gives the form of a proclamation of *Charles the First* for calling a parliament. By the 22nd article of the act of the union (c), it is declared that a writ shall issue under the Great Seal of the United Kingdom, directed to the Privy Council of *Scotland*, commanding them to cause sixteen peers, who are to sit in the House of Lords, to be summoned to parliament; and that the names of the persons so summoned and elected shall be returned by the Privy Council of *Scotland* into the Court from whence the said writ did issue. And by the 6 *Anne*, c. 23, s. 1, it is enacted—"That, at all times thereafter, when her Majesty, her heirs and successors, should declare her or their pleasure for summoning and holding any parliament of *Great Britain*, in order to the electing and summoning the sixteen peers of *Scotland*, a proclamation should be issued under the Great Seal of *Great Britain*, commanding all the peers of *Scotland* to assemble and meet at *Edinburgh*, or such other place in *Scotland*, and at such time as should be appointed in the said proclamation, to elect by open election the sixteen peers to sit and vote in the House of Peers in the parliament of *Great Britain*." In the *Journals of the Lords* (d), mention is made of a list or roll of *Scotch* peers which the Lords of Session had been ordered to furnish to the House; which list contains the name of an Earl of *Stirling*, and is the

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(a) Lord Kaimes's Essays, 55.

(b) Page, 33.

(c) 5 Anne, c. 8.

(d) Vol. 18, p. 399—Vol. 25, p. 416.

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list or roll still referred to (a), and is that mentioned in the plea. It is not necessary for a lady claiming peerage to shew her peerage by matter of record, her title accruing by matter of fact—The Countess of *Rutland's* case (b); and the like reasoning applies to the case of a *Scotch* peer.

Where all the facts alleged unite in one point, as here, the plea is not double.

Lord Chief Justice TINDAL.—It appears to me that the plea put upon the record in this case is insufficient, and consequently that there must be judgment of *respondeat ouster*. The plea in question is not a plea claiming jurisdiction in another Court, but strictly and properly a plea in abatement on the ground of a misnomer of the defendant. The title of an earl is the substance of his name; therefore, the writ in this case must abate if the plea be properly pleaded. Now, this being a plea in abatement, which the law calls a dilatory plea, and the objection not being one affecting the justice of the case, it must be taken strictly; and the question is, whether a proper issue can be taken upon that fact which is set up by the defendant as the ground of abatement. It seems to me that the plea contains no distinct allegation of facts whence such a conclusion as that contended for on the part of the defendant can be drawn. It no where alleges, that, at the time of issuing the writ in this cause, the defendant was Earl of *Stirling*, and liable to be sued by that name. The plea begins by setting out the royal proclamation reciting the death of the late Earl of *Balcarres*, and commanding the peers of *Scotland* to assemble on a particular day at *Holyrood House*, to choose in his room a peer of *Scotland* to sit and vote in the House of Peers for the then present parliament: the plea then goes on to state, that, on the day mentioned in the proclamation, divers of the peers of

(a) See Wight on Elections, c. 2, p. 125, n.

(b) 6 Rep. 52 b.

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Scotland, in obedience thereto, met at *Holyrood House*; that, at the said meeting, the long or great roll of the peers of *Scotland* was called over; that the defendant, *being* Earl of *Stirling*, was present at the meeting for the purpose of giving his vote as a peer of *Scotland* at the said election; that, upon the title of Earl of *Stirling* being called, he claimed to vote, as Earl of *Stirling* and entitled to the honors and dignity of Earl of *Stirling*, and he then and there answered to his title of Earl of *Stirling*, and his vote was then and there taken and received by the clerks of session, and the oath required by law to be taken by him as a peer of *Scotland* administered to him by such clerks of session; and that he did as Earl of *Stirling* as aforesaid vote at the said election for *James*, Viscount *Strathallan*, who afterwards, by virtue of such election, took his seat and voted in the House of Peers in the then parliament of the United Kingdom. The plea further sets forth another instance of voting as a peer of *Scotland* by proxy. This shews nothing more than that, upon the occasions alluded to, the defendant assumed to act as Earl of *Stirling*: it does not conclusively shew him to be Earl of *Stirling*, *de jure*. The allegation, it is true, is, that he, *being* Earl of *Stirling*, did the acts set forth. The question is, whether, on the day mentioned, he was in fact Earl of *Stirling* or not. There is no such distinct allegation of this fact that issue could be taken upon it. The precedents in this branch of pleading are few. In the common form of a plea in abatement, of misnomer, the day of suing out the writ is covered: thus—"The said *C. D.*, against whom the plaintiff hath exhibited his bill by the name of *D. E.*, comes and defends the wrong and injury when &c., and prays judgment of the said bill, because he says that he the said *C. D.* is named and called by the name of *C. D.*, and by that name hath always hitherto been named and called; *absque hoc*, that he is, or at the time of exhibiting the plaintiff's bill was, named

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or called by the name of *D. E.*”—excluding, therefore, the fact of there being at the time of the suing out the writ any other name by which the defendant could legally be sued (a).

I find two old cases and one comparatively new, of pleas in abatement by earls; but, in these cases, the allegations that the party was an earl are distinct and positive. In the *Year Book* (b)—“*Brief de ravishmēt de gard’ fuit port vs Gilbert Umfravil, chivalier. Kirton demanda jugmēt de bñ, p̄ c̄ q. Gilbert Umfravil est Conte d’Angos, nient nome Conte. Judgment de bñ. Fend. Le Conte d’Angos n’est p̄z deins le royaume d’Angleterre, et p̄tant ē ne poit estre trie, le quel il soit Conte ou nient: issint n’ē my cel’ nom de dignity, forsqz surnom. Jugemēt, si nñ bñ ne soit assen bon. Kirton. Le nom de Conte est nom de dignity et p̄ cel’ nom doit il estre noñ: et il est somonē a chesē parliamēt per nom de Conte; et le Roy mander a luy le grand’séal come a Per del tñe. Et puz le bñ abata, &c.*” There, there clearly appears to have been an averment that the defendant was Count d’Angos. In *Fisherbert’s Abridgment* is the following passage: “*Labb. de founteyn, port bñ de faux imp̄sōmēt vers un W. Fraunc. Fulth. Le bñ est si abbas fecerit te securum nīz nosmant son propre nosme: par que Marten; Labb. est nosme de*

Plea that the defendant is a baronet, and not a lord, as sued.

(a) “And the said Sir T. W. Bart., commonly called Lord N., of the kingdom of Ireland, against whom the said A. B. has sued out his original writ by the name of Thomas, Lord N., late of, &c., comes, &c., and prays judgment of the said writ, Because he says that the said Sir T. W., on the day of suing out the said original writ of the said A. B., and long before, was, and still is a baronet: and this, &c., wherefore, for that the said Sir T. W. is not named and

sued by the said original writ of the said A. B. by the name of Sir T. W., Bart., commonly called Lord N., of the kingdom of Ireland, as he ought to have been, according to the form of the statute in that case made and provided, the said Sir T. W. prays judgment of the said writ, and that the same may be quashed, &c.” From Mr. Tidd’s collection of MS. precedents.

(b) 39 Edw. 3, pl. 35.

*dignitas * * * et abb. est suffic nosme, et siP ad suffic nosme il suffis etc * * ** Mes si Counte soit a porter b̄c il convient q' ambideux noemes soient noemes cōe J. Erle de ꝑc." (a).

In that case also there was a distinct allegation that the party sued was an earl. In the case of the Earl of *Banbury* (b), indicted for murder by the name of *Charles Knolls, Esq.*, there was a plea of misnomer in abatement: the plea alleged that the defendant ought not to be compelled to answer to the indictment, because he said that King *Charles* the First, by his letters patent (of which profert was made), created his, the defendant's, grandfather an earl of this kingdom, &c., and thereby the honor was entailed upon the male line; and then shewing his own descent, *and that he was heir male, and Earl of Banbury*; concluding with *hoc paratus est verificare, &c.* It appears, however, that so much did the defendant distrust this plea, that he afterwards moved for and obtained leave to amend by adding an averment "that his uncle, who was of the elder branch, was dead without issue, *and that he himself was a peer at the time of the plea pleaded.*" Thus it appears always to have been deemed necessary to allege distinctly that the party was a peer at the time the question arose. It seems to me, therefore, that the plea pleaded in this case is bad.

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Mr. Justice PARK.—I am of the same opinion. In the common plea of misnomer, the defendant must give his surname as well as his true Christian name, although his true surname be used in the declaration. *Haworth v. Spraggs* (c), *Docker v. King* (d), *Peake v. Davis* (e). In the present case, it is not stated on the face of the plea with sufficient certainty, that the defendant is Earl of *Stirling*.

(a) Fitz. Abr. tit. "Briefe,"
pl. 40.
(b) Carthew, 297.

(c) 8 Term Rep. 515.
(d) 5 Taunt. 652.
(e) 5 Taunt. 653 n.

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Mr. Justice GASELEE.—I am of the same opinion. The plea consists of several allegations of circumstances which are only matters of evidence, concluding argumentatively—"and so the said earl, the defendant in this suit, says that he, before and at the time of the issuing the said writ of the plaintiff in this suit, was, and ever since has been, and still is, Earl of *Stirling*," &c. A plea in abatement must be correct in every part of it. It does not follow, that, because the defendant's vote was on two occasions received at the election of representative peers of Scotland, he is Earl of *Stirling*; or, because he once was Earl of *Stirling*, that he is so still. The conclusion of the plea certainly tenders an issue—*absque hoc* "that he, the said *Alexander*, Earl of *Stirling*, now is, or at the time of issuing the said writ of the plaintiff in this suit was, named or called by the name of *Alexander Humphreys Alexander*, as by the said writ and declaration thereon founded is above supposed:" but that alone is not sufficient to make the plea good.

Mr. Justice ALDERSON.—I am of the same opinion. Every fact stated in this plea may be true, and the conclusion may yet be false. The defendant does not allege that he, *being* Earl of *Stirling*, voted on the occasion he mentions; but that he voted *as* Earl of *Stirling*. There is nothing more stated upon the face of the plea than would have been *prima facie* evidence of the fact of the defendant's being Earl of *Stirling*, had such fact been clearly and positively averred.

Respondent ouster (a).

(c) See the precedent in *Blackmore v. The Earl of Wigtown*, 3 *Wentworth's Pleadings*, 296. See also the case of *Lord Lonsdale v.*

Littledale, 2 H. Blac. 267, 299, and note (a), p. 272. *Hosier v. Lord Arundell*, 3 Bos. & Pal. 9, and note (b).

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DOE, on the several demises of *Rew and Others*,
v. *LUGRAFT*.

Thursday,
May 3rd.

THIS was an action of ejectment tried at the Sittings in *London*, in *Michaelmas* Term, 1831, when a verdict was, by consent, found for the lessors of the plaintiff, subject to the opinion of the Court upon the following case; with liberty to enter a verdict for the defendant, if the Court should think him so entitled:—

“The declaration was of *Hilary* Term, 1 *William* 4; for one undivided moiety or half part, the whole into two equal moieties or half parts to be divided, of and in four messuages, four shops, four warehouses, four storehouses, four stables, four coach-houses, four outhouses, twenty vaults, twenty cellars, four yards, four gardens, and one acre of land, with the appurtenances, situate and being in the parishes of *St. Mary Matfellow*, otherwise *Whitechapel*, and *St. Botolph, Aldgate*, in the city of *London*, on two several demises, one by *William Pell Rew, Richard Baggallay*, and *Thomas Dickinson*, on the 2nd *November*, 1830, and the other by the said *William Pell Rew* and *Richard Baggallay*, on the 5th of *April*, 1831.

“The defendant pleaded the general issue.

“This ejectment was brought by the lessors of the plaintiff (*William Pell Rew* and *Richard Baggallay*) as the acting devisees in fee, in trust for sale, under the will of *James Newton*, of *Aldgate, High Street*, in the parish of *St. Mary, Whitechapel*, in the city of *London*, wine and brandy merchant, deceased, who became the heir of *John Newton*, of *Broadclyst*, in the county of *Devon*, gentleman, deceased, to recover possession of one undivided moiety of a freehold messuage, with the appurtenances, situate

The testator devised as follows:—“I give and devise my reversion in the messuage in *Aldgate* unto *A. C.* and *M. A.* and their heirs, in trust, as to one moiety, for *N. L.* his heirs, &c., and, as to the other moiety, in trust for such son of mine as shall first attain the age of twenty-one years, and for his heirs, &c. But, in case I shall depart this life without leaving a son, or, leaving such, none shall attain the age of twenty-one, then, as to the last-mentioned moiety, in trust for my daughter *J. N.* &c. But, should I depart this life without leaving issue, then I give and devise the entirety of the said messuage, &c. unto the said *A. C.* and *M. A.* and their heirs, in trust for the said *N. L.*, his heirs and assigns for ever.” The testator died leaving a daughter who also died at the age of four years:—

Held, that *N. C.* took under this will only a moiety, and not the entirety over.

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in *Aldgate, High Street*, aforesaid, which the defendant claimed to hold to him and his heirs, under the will of the said *John Newton*.

" *Henry Newton*, of *Aldgate, High Street, Whitechapel*, in the city of *London*, wine merchant, being seised in fee simple of the entirety of the freehold property in question, by his will, dated the 4th of *August*, 1803, devised the same unto his brother, *James Newton*, and his assigns, for his life, with remainder to trustees to preserve contingent remainders, with remainder to the testator's nephew, *Henry Newton* (son of the testator's eldest brother, *John Newton*), for his life, with remainder to trustees to preserve contingent remainders, with remainders in strict settlement to the issue of the said *Henry Newton*, the nephew, with remainder to the testator *Henry Newton's* own right heirs for ever.

" The testator *Henry Newton* died on the 27th of *November*, 1819, without issue, leaving the said *John Newton*, his eldest brother and heir-at-law, and the said *James Newton*, his only other brother, him surviving; and his will was proved in the Prerogative Court of the Archbishop of *Canterbury* on the 11th of *January*, 1820.

" The said *Henry Newton*, the son of the said *John Newton*, died without issue, in the life-time of the said testator, *Henry Newton*, and also in the life-time of his father.

" The said *John Newton*, by his will, dated the 29th of *October*, 1822, duly executed and attested to pass freehold estates (among other things), devised as follows:—

" ' I give and devise all that my reversion in fee expectant upon the life estate of my said brother (*James*) of and in all that messuage or tenement and premises, formerly two messuages or tenements, situate in *Aldgate, High Street*, now in the occupation of my said brother, unto the said *Arthur Clarke* and *Mark Ashford*, and their heirs, in

trust, nevertheless, as to one undivided moiety or half part thereof, for the said *Nicholas Lucraft* (the defendant), his heirs and assigns, for ever; and, as to the other undivided moiety or half part thereof, in trust for such son of mine by my present wife issuing *as shall first attain the age of twenty-one years*, as and when such son shall attain such age, and for his heirs and assigns for ever; but, in case I shall depart this life *without leaving a son, or, leaving such, none shall live to attain the age of twenty-one years*, then, as to the said last-mentioned moiety or half part, in trust for my said daughter, *Jane Newton*, if she shall live to attain the said age of *twenty-one years*, and for her heirs and assigns for ever; but, in case my said daughter, *Jane Newton*, shall depart this life under that age, then I give and devise the said last-mentioned moiety or half part unto the said *Arthur Clarke* and *Mark Ashford*, and their heirs, in trust for such other my daughter by my present wife as shall first live to attain the age of *twenty-one years*, and for her heirs and assigns for ever: But, should I depart this life *without leaving issue*, then I give and devise the entirety of the said messuage or tenement and hereditaments, situate in *Aldgate* aforesaid, unto the said *Arthur Clarke* and *Mark Ashford*, and their heirs, in trust for the said *Nicholas Lucraft*, his heirs and assigns for ever.'

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" The said *Nicholas Lucraft* was the said *John Newton's* wife's brother, and, at the time of the making of the said will of the said *John Newton*, the said *James Newton* was not and had never been married, and was of the age of sixty-five years and upwards.

" The said *John Newton* died in or about the month of *March*, 1824, in the life-time of the said *James Newton*, leaving *Jane Newton*, his only child; and without having revoked or altered his said will; and the same was afterwards duly proved in the Prerogative Court of the Archbishop of *Canterbury*

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" The said *Jane Newton* died in the month of *October*, 1826, an infant of the age of four years, or thereabouts, leaving the said *James Newton*, her uncle, her heir-at-law, her surviving.

" The said *James Newton*, by his will, dated the 22nd of *April*, 1823, duly executed and attested to pass freehold estates, after bequeathing certain pecuniary legacies, as to all the rest, residue, and remainder of his estate and effects, of what nature or kind soever and wheresoever that he should be possessed of, interested in, or entitled to, at the time of his decease, and not thereinbefore disposed of, he gave, devised, and bequeathed the same and every part thereof to his trustees and executors, the said *William Pell Rew*, *Richard Baggallay*, and *Thomas Dickinson*, to hold to them, their heirs, executors, and administrators, upon the trusts therein mentioned, and appointed the said *William Pell Rew*, *Richard Baggallay*, and *Thomas Dickinson*, executors of his said will.

" The said testator, *James Newton*, duly republished his said will on the 21st *July*, 1827, and died on the 18th *October*, 1830; and the said *William Pell Rew* and *Richard Baggallay* proved the same will on the 30th *October*, 1830, in the Prerogative Court of the Archbishop of *Canterbury*, the said *Thomas Dickinson* having renounced probate thereof; and by an indenture dated the 2nd *April*, 1831, the said *Thomas Dickinson* renounced and disclaimed the trusts of the said will of the said *James Newton*.

The question for the opinion of the Court was—

" Whether the defendant, *Nicholas Lucraft*, took any and what estate in the moiety of the freehold premises in question under the ultimate devise contained in the said will of the said *John Newton*."

The case now came on for argument.

Mr. Serjeant *Scriven*, for the lessor of the plaintiff, contended, that, upon the true construction of the will, the tes-

tator must be taken to have contemplated, either a general failure of issue, in which case the devise over to *Lucraft*, the defendant, would be too remote, and consequently bad as an executory devise; or the event of his death without leaving issue, which event had never happened, his daughter having survived him. He referred to *Forth v. Chapman* (a), *Beauclerk v. Dormer* (b), *Sheffield v. Lord Orrey* (c), *Chandless v. Price* (d), *Crook v. Dovandes* (e), *Barlow v. Salter* (f), *Doe d. Lyde v. Lyde* (g), and *Franklin v. Lay* (h).

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Mr. Serjeant *Stephen*, *contra*.—Aided by the previous devise, the words in the devise in question “without leaving issue,” must be held to mean such issue as the testator had been before contemplating, *vis.* “such issue as should attain the age of twenty-one years.” A devise over in default of “issue,” is always taken to mean such issue as had before been contemplated—*Blackborn v. Edgley* (i), *Mores v. The Marchioness of Ormond* (k), *Ginger v. White* (l), *Target v. Gaunt* (m), *Farthing v. Allen* (n), *Gulliver v. Wickett* (o), *Fonnereau v. Fonnereau* (p). In the case of *Merse v. The Marchioness of Ormond*, the Vice-Chancellor says (q): “That the literal force of the expressions here used is not according to the real intention of this testatrix admits of no doubt; and the question is, whether, upon the whole of this will, there is sufficient evidence of intention to warrant the Court in holding that when this

(a) 1 P. Wms. 663.

(b) 2 Atk. 308.

(c) 3 Atk. 288.

(d) 3 Ves. 99.

(e) 9 Ves. 197.

(f) 17 Ves. 482.

(g) 1 Term Rep. 593.

(h) 6 Madd. 258.

(i) 1 P. Wms. 600.

(k) 5 Madd. 99.

(l) Willes, 348.

(m) 1 P. Wms. 432.

(n) 2 Madd. 310.

(o) 1 Wils. 105.

(p) 3 Atk. 315; and see *Doe d. Fonnereau v. Fonnereau*, 2 Doug. 487.

(q) 5 Madd. 113.

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testatrix used the expression, 'from and after the failure of issue of my said daughter,' she must be understood to mean issue of my said daughter as aforesaid. All Courts, in the construction of wills, are in the constant habit of supplying such, and larger words, where the context of the whole will requires it."

The devise over would, undoubtedly, be too remote, unless the Court can imply an estate tail in the first takers. In *Tenny d. Agar v. Agar (a)*, under a devise of lands to the testator's son and his heirs for ever, as to part of the lands, upon condition that he should pay the testator's daughter 12*l.* a-year till she came of age, and then pay her 300*l.*, and, in default of payment, that she should enter upon and enjoy the said part, to her and her heirs for ever; and, in case his son and daughter both died without leaving any child or issue, the testator devised the reversion and inheritance of all the lands to another: it was held that the devise over was not an executory devise, but a remainder limited after successive estates tail of the son, and also of the daughter by implication; the intent being apparent that the devise over should not take effect till after failure of the issue of the son and daughter, and that it should then take effect; and this being the only construction that would give effect to such intent, consistently with the whole of the will taken together.

Lord Chief Justice TINDAL.—I am of opinion, that, upon the proper construction of this will, our judgment must be given for the lessors of the plaintiff. The words of the will upon which the question arises are—"Should I depart this life without leaving issue, then I give and devise the entirety of the said messuages or tenements and hereditaments situate in *Aldgate* aforesaid unto *Arthur Clarke* and *Mark Ashford*, and their heirs, in trust for the said *Ni-*

cholas Lucraft; his heirs and assigns for ever." Now, what is the true construction of this expression—"Should I depart this life without leaving issue?" The natural meaning of the words is, either a general failure of issue, in which case the devise over would be too remote, and consequently would be void; or they may be taken to contemplate the case of the testator dying leaving no child or children, in which case the event upon which the devise over was to depend never happened, for, the testator left a daughter living at the time of his death. But it is contended on the part of the defendant that these words will also admit of a third interpretation, and that the will may be read as if the words had been thus—"Should I depart this life without leaving *such issue as before mentioned*"—that is, not only without leaving a son or a daughter, but accompanied by the restriction before recited in the will, *viz.* a son or a daughter who shall live to attain the age of twenty-one years. Cases have been cited to shew that the word issue may be construed to mean such issue as the testator had before referred to; but no case can be found wherein the principle has been carried further: it has never been held that the term may also include any restrictions which may have accompanied it in any former part of the will. Admitting that we may read the clause thus—"without leaving a son or daughter;" what authority have we to insert a restriction—"who shall live to attain the age of twenty-one years?" We clearly are not at liberty to insert any such restriction. It seems to me, that, if we were to import these latter words into the will, we should be doing violence to other parts of it, or, in fact, making a new will altogether. The earlier part of the will contains a different disposition from that in dispute. It is material to observe, that, when the testator is disposing of the moiety in question to his son, and afterwards to his daughter, he does insert the words of restriction; and that he has omitted them in the devise over to the defendant. When, there-

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fore, we see, that, in one part of his will, the testator has used expressions restraining the meaning of the word *issue*, and that, in other part he has not used them, it seems to me that we should not be warranted in concluding that such omission was not intentional.

It is contended that the words mean a general failure of issue, and that an estate tail may be implied, to prevent the devise over from being too remote. It appears to me, however, that the cases cited put an end to the argument. There is also this additional difficulty, *viz.* that we cannot clearly see in whom the estate could be vested. The proposition contended for on the part of the defendant not being established to my satisfaction, I can only give such a construction to the devise as the natural meaning of the words of it will warrant, that is, that the testator only intended the estate to go over to the defendant in an event which has not happened, *viz.* the event of his dying without leaving issue.

Mr. Justice PARK.—I am of the same opinion. This will appears to me to have been made with advice. In one part of it, the testator uses words restrictive of the sense in which he employs the term “*issue*,” and he afterwards leaves them out. From the fact of such omission, I draw a conclusion different from that contended for on the part of the defendant. I think we cannot insert them.

Mr. Justice GASELEE concurred.

Mr. Justice ALDERSON.—I am also of opinion that there should be judgment for the lessor of the plaintiff. There is no doubt but the word *issue* may be restrained by its use in a preceding part of the will. But the argument in this case goes further. It seeks to engraft another condition upon the devise.

Judgment for the lessor of the plaintiff.

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THE defendant in this case was arrested at the suit of the plaintiff on the 27th of *June* last, upon a *capias ad respondendum* returnable on the 2nd *November*. A rule to declare was entered by the defendant on the 1st *February* following, and, on the same day, a demand of declaration served upon the plaintiff's attorney. On the 6th the plaintiff's attorney took out a rule to discontinue the action, on payment of costs, which was served upon the defendant's attorney, together with an appointment to tax his costs on the 7th, on which day the plaintiff's attorney delivered a declaration to the defendant's attorney. This declaration being in *debt*, and the action commenced in *assumpsit*, the defendant's attorney treated it as a nullity, and signed judgment of *non pros*.

The plaintiff's attorney being served with a rule to declare, in order to gain time, took out a rule to discontinue on payment of costs, and after taxation delivered a declaration in *debt*, the action being *assumpsit*. The defendant's attorney signed judgment of *non pros*. The Court refused to set aside the judgment, except on payment of all the costs incurred by the defendant.

Mr. Sergeant *Jones*, on a former day, obtained a rule *nisi* to set aside the judgment for irregularity, with costs, upon an affidavit of the plaintiff's attorney, which stated that the attorney for the defendant having, on or about the 2nd *February* last, demanded a declaration in the cause, the deponent did, in order to prevent judgment of *non pros*. being signed, take out a rule to discontinue, upon payment of costs, and that, upon the taxation of the costs, he received directions from his client, who resided at *Horne*, in *Yorkshire*, to proceed with the action, and that, in pursuance of such instructions, he did, on or about the 7th *February*, the costs being unpaid, and never having been demanded, and before any further proceedings were taken by the defendant's attorney, cause a declaration to be delivered.

Mr. Serjeant *Wilde* now shewed cause, upon an affidavit shewing that the declaration delivered was a nullity,

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and stating that the plaintiff's attorney had promised to pay the costs at the time of taxation, and consequently that his subsequent proceeding was against good faith.

Mr. Serjeant *Jones*, in support of his rule.—The rule to discontinue is conditional only; if nothing is done upon it, it falls to the ground. In *Edgington v. Bowdenham* (a) it was expressly decided that taxation of costs, without payment of them after a summons to discontinue is no discontinuance. Mr. Justice *J. Parke* there said: "The taxation of costs, without payment of them, is not a discontinuance. The words of the rule are, 'upon payment of costs.' The condition of the discontinuance is therefore not fulfilled without payment, and, consequently no discontinuance has taken place. The taking out of the rule to discontinue, and the taxation of costs, only amount to an offer to do something which is not done."

[Lord Chief Justice *Tindal* referred to *Stokes v. Wode-son* (b), where it was held, that, though the plaintiff discontinue on the common rule, on payment of costs, he is not liable to an attachment for non-payment.

In *Tidd's Practice* (c), it is said: "The rule, being conditional, is no stay of proceedings; and it has been holden that for non-payment of these costs, the plaintiff is not liable to an attachment:" and the case of *Stokes v. Wode-son* is referred to (d).

Lord Chief Justice TINDAL.—It appears to me that the general rule does not come in question on the present occasion. The plaintiff's attorney in his affidavit states, that, the defendant having demanded a declaration, he, in order to prevent judgment of *non pros.* being signed, took out a rule to discontinue on payment of costs: or, in other

(a) 1 Dowl. Pr. Rep. 152.

(c) 9th Edit. p. 680.

(b) Term Rep. 6.

(d) And see *Malling v. Buck-*

words, that he took out the rule for the mere purpose of gaining time, and without having any intention of acting upon it. That is not the purpose for which a rule to discontinue ought to be taken out. From his own shewing, the plaintiff's attorney was guilty of a fraud upon the practice of the Court. The rule must therefore be discharged, unless the plaintiff will consent now to pay the costs of the judgment of *non pros.* and the costs of this motion.

Mr. Justice PARK.—The taking out the rule to discontinue, when the plaintiff had no intention to act upon it, was a fraud upon the practice of the Court. By his own statement, it appears that the attorney merely took it out for the purpose of gaining time till he could hear from his client. It was an attempt to lull the defendant into a false security. It seems to me that the judgment was properly signed.

Mr. Justice GASELEE.—It has been held that an allegation that an action has been discontinued, is not proved by the mere production of a rule to discontinue (*a*). On the grounds above stated, however, I think this rule should be discharged: the plaintiff must not be permitted to take advantage of his own wrong.

Mr. Justice ALDERSON had left the Court, but previously signified his concurrence.

Rule discharged (*b*).

holtz. 3 Mau. & Selw. 153—*Whitmore v. Williams*, 6 Term Rep. 765—*Howarth v. Samuel*, 1 Barn. & Ald. 566; *S. C.* 1 Chit. Rep. 633—*Brandt v. Peacocke*, 3 Dow. & Ryl. 2; *S. C.* 1 Barn. & Cress. 649.

(*a*) But see *Faushawe v. Heard*, 1 Moore & Payne, 191, where the Court (with the exception of Mr. Justice Gaselee) seem to have

thought that a rule to discontinue would have been sufficient to support an allegation in a declaration that the plaintiff *did discontinue* the action.

(*b*) The rule was discharged conditionally—unless the plaintiff should elect to pay the costs of the judgment of *non pros.* and of the motion.

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WILLIS v. BERNARD.

In an action for criminal conversation, letters written by the wife to third persons, before the commencement of the adulterous intercourse, are admissible in evidence to shew the general state of feeling and affection between the husband and wife, on the same principle that general conversations are admissible: and such a letter is not to be rejected merely because it contains statements of specific facts which perhaps are not strictly evidence.

THIS was an action on the case, brought to recover a compensation in damages for criminal conversation by the defendant with the plaintiff's wife.

The cause was tried before Lord Chief Justice *Tindal*, at the Sittings at *Westminster* after the last term. It appeared that the plaintiff and his wife, up to the year 1828, had resided in *Upper Canada*. On the 20th of *June* in that year, the plaintiff, having business in *England*, departed from *Canada*, accompanied by his mother, leaving his wife there. The circumstance of the plaintiff having left his wife in *Canada* was strongly relied on by the defendant's counsel, who, on cross-examination of the plaintiff's witnesses, sought to elicit the fact that the plaintiff and his wife did not live together in much harmony. In order to rebut these insinuations, and to shew the then state of the wife's feelings towards her husband, the plaintiff gave in evidence the following letter written by Mrs. *Willis* to her husband's brother, before the commencement of her acquaintance with the defendant:—

“ *York, U. C., 25th July, 1828.*

“ My Dear Mr. *Willis*,

“ I wrote yesterday to *John* (the plaintiff) in a packet that was sent over by the steam-boat, in order to leave *New York*, if possible, by the *Pacific*, the 1st of *August*; but I had not time to write to you by the same packet. I am truly glad to hear that Mrs. *Willis* has derived benefit from change of scene and air. As this is a letter on business, I do not intend to write on any other topic. I wrote a letter to Mr. *Whitton* by *John*, which I am most anxious should be delivered as soon as possible after his arrival in *England*, though I fear *John* will not do so, as he was quite averse to my writing it at all. Now, my

dear Mr. *Willis*, it is absolutely necessary *John* should immediately settle all concerns with Messrs. *Salt*; therefore I am exceedingly anxious that my trustees should transfer all or any part of the property in the funds in my name, to the name of *John Walpole Willis*, to be applied to his use, for the payment of any debts he may have incurred, so far as it will go. I need not say to you that *John's* desire is to add to any property his wife and child may have, instead of taking any part away; but the only way to increase his property is, to be perfectly unembarrassed in pecuniary affairs. Should, however, the trustees be averse to transfer the stock to *John's* name, there is a plan, which, as it more immediately concerns myself, I am determined to adopt; the more so as I should imagine the trustees could not offer any objection to it. As you are aware my husband settled on me, for my sole use, and during my life, any property I may or might have, I propose to do this, which cannot injure any one, but, on the contrary, will benefit us all. It is, to sell my life interest in the sum of 5,000*l.*, for which, as I am young (twenty-six in *August*, and I may say strong and healthy), I should get at least 1,500*l.* or 2,000*l.* more than the sum. I earnestly entreat you to forward this plan as much as you can, and thus procure me one of the greatest pleasures the money could ever afford me—of being able to forward in any degree, however trifling, the happiness or benefit of my husband; and I am sure none of us can be contented until we are quite out of debt.

“ Should this plan, which is entirely my own, and which I am determined to pursue, succeed to my wishes, the money is to be immediately paid to *John*, to pay off all debts, so far as it is sufficient to do so. I have considered this very frequently, and still it appears to me the best means to adopt, as, at my death, should *John* survive me, it will still be for him and my child, and it will afford me more real gratification than I can express. *John's* mind,

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as well as my own, will be relieved of a great annoyance, and then he will be better able to exercise his talents for the benefit of himself and family. It is little I can do, and he has sacrificed much for me; but what little I can I ought and will do as far as I can.

"I have to request another favor of you—not to mention this to *John* until you have well considered it yourself, and consulted those you think understand the subject, and who will give unbiassed advice. My husband would, I am aware, object to it; and indeed he ought not to be subjected to my trustees' denial; and I am anxious for you to explain to them that my husband is quite ignorant of my having written this letter, and therefore I am perfectly unbiassed by his opinion or advice on this subject.

"Should the trustees object to this plan, I shall consider of some other means of deriving benefit from money which is now almost thrown by, as the interest is surely far too little for 5,000*l*.

"Excuse this troublesome office. Accept the united loves of all here, and give the same to all dear friends; and believe me to be, my dear Mr. *Willis*, Yours, &c.,

"*Mary Isabella Willis.*"

On the part of the defendant, it was objected that this letter was not admissible in evidence—*first*, on the ground that it was addressed to a third person and not to the husband himself, and therefore not within the decided cases—*secondly*, that, if not objectionable on that account; still that it was inadmissible on the ground that it contained, not merely general expressions of kindness and good will, but also specific facts and circumstances which could not be given in evidence.

His Lordship admitted the letter, conceiving it to amount to the same as a *conversation* with a third party; but he reserved the objections; and he told the jury that

they were only to take the letter as evidence of the general feeling of the wife towards her husband.

The jury returned a verdict for the plaintiff—damages, 1000*l*.

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Mr. Serjeant *Spankie*, accordingly, on a former day in this term, obtained a rule *nisi* that this verdict might be set aside, and a new trial had, on the ground that the letter had been improperly received in evidence; and also that the damages were excessive.

Mr. Serjeant *Wilde* now shewed cause.—In ascertaining the admissibility or non-admissibility of any particular piece of evidence, regard must be had to the peculiar circumstances by which it is called forth. In the present case, it was insinuated at the trial that the plaintiff and his wife lived together unhappily, and that she was irritated at his absenting himself. To controvert these insinuations, and to shew the actual state of feeling between the parties, the letter was produced. The manner in which Mrs. *Willis* spoke of her husband's absence would clearly have been admissible in evidence to shew the state of her feelings towards him. A correspondence by letter where parties are at a distance from each other, is tantamount to a conversation. Suppose that, in the letter in question, Mrs. *Willis* had merely in general terms stated that she was desirous to do all in her power to relieve her husband from his difficulties, the admissibility of the letter would not have been disputed. Does, then, the fact of her suggesting the particular mode of effecting this object, alter its character? There is no principle to be found in any of the decided cases that is inconsistent with the admissibility of such a letter; and the fact of its having been addressed to a third person makes no difference. In *Edwards v. Crock* (a), it was held, that, where the

(a) 4 Esp. Rep. 39.

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husband and wife necessarily, from their situations in life, live separate, and the wife commits adultery, letters written by her during their separation, but before any suspicion of misconduct in the wife, are admissible evidence to shew that the husband and wife lived in a state of connubial affection previous to the adultery. So, in *Trelawny v. Coleman* (a) letters written by the wife to the husband (while living apart from each other), proved to have been written at the time they bore date, and when there was no reason to suspect collusion, were held to be admissible evidence, without shewing distinctly the cause of their living apart. Lord *Ellenborough*, in that case said: "What the husband and wife say to each other is, beyond all question, evidence to shew their demeanor and conduct, whether they were living on better or worse terms: what they write to each other may be liable to suspicion; but, when that is cleared up, that ground of objection fails." Mr. Justice *Bayley* said: "When it is once established that the manner in which the husband and wife conduct themselves towards each other (when together), is admissible evidence, it follows that letters, which in absence afford the only means of shewing their manner of conducting themselves towards each other, are also admissible. There may, indeed, in letters, be an assumed affection which does not actually exist; but the behaviour of the parties themselves is open to the same objection; for, they may (when together) assume an appearance of affection which has not any foundation in truth and sincerity." And Mr. Justice *Abbott* said: "There was very sufficient proof in this case that the letters were written at the time they bore date, and when no suspicion was entertained of the wife's misconduct; and, that being established, I think they were properly received to shew that the husband and wife were living upon good terms."

(a) 1 Barn. & Ald. 93; S. C. 2 Stark. N. P. C. 191.

[Mr. Justice *Alderson*.—It seems from the report of that case in *Starkie*, that the witness there was allowed to draw her inference from the conversations (a).]

The jury were told that they were only to take the letter as evidence of the general feeling of the wife towards her husband: and the fact of its having a tendency to prove a particular fact which of itself might not be evidence, does not render the whole letter inadmissible. In the late case of *Manning v. Clement* (b), which was an action for a libel, the plaintiff alleged in his declaration, that, at the time of the publication, he exercised and carried on, in a lawful manner, the trade and business of a manufacturer of bitters, with which, in the way of his trade, he supplied various licensed publicans, and then proceeded to state that the defendant published the libel of and concerning the plaintiff in the way of his trade; it was held that evidence might be admitted under the general issue, with reference to the allegation of the trade or business of the plaintiff, that what he sold was not bitters, but a composition of a different description; although this evidence incidentally tended to prove the truth of the libel, which charged the plaintiff with vending an illicit mixture.

Mr. Serjeant *Spankie* and Mr. Serjeant *Storks*, in support of the rule.—The object of the introduction of evidence of this kind is, to shew the state of feeling between the parties prior to the time of the adulterous intercourse taking place. It is an exception engrafted upon the salutary rule which prevents the wife from being admitted as a witness for her husband. In the present case it is sought to extend that exception. In *Edwards v. Crock*, and *Tre-*

(a) The opinion which a witness has formed of the wife's affection for her husband, from the anxiety which she has expressed for him, and her mode of speak-

ing of him during his absence, is also evidence to the same end. 2 *Starkie* on Evidence, 442.

(b) 5 *Moore & Payne*, 211; *S. C.* 7 *Bing.* 362.

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lawney v. Coleman, the parties were in humble circumstances; and the letters were admitted in evidence on the ground of necessity, they being the only evidence that could, from the situation of the parties, be procured. There is no such necessity here. Besides, the rule, even as to the admissibility of conversations, is confined to general expressions of kindness: whereas here, the letter was offered, not for the purpose of shewing the general affectionate feeling of the wife towards her husband, but to prove a specific fact, *viz.* an offer by the wife to make certain sacrifices for the benefit of her husband. In *Starkie, on Evidence*, it is said (a): "Lord *Ellenborough*, in *Trelawney v. Coleman*, is reported to have said, what the husband and wife say to each other is evidence to shew their demeanor and conduct. But *quære* whether the evidence in such case ought not to be general?" In this case the letter was admitted on the footing of a conversation. But there is no sound reason for applying the principles of the cases of *Edwards v. Crock* and *Trelawney v. Coleman* to the case of letters to third persons. If the person to whom the letter was addressed had been called to prove instead, conversations had between Mrs. *Willis* and himself, it is perfectly clear that he could only have been examined as to general conversations, and not as to conversations touching a particular fact; such not being a fair test of the feelings of the parties.

The case of *Manning v. Clement* is materially distinguishable. There, the plaintiff in his declaration alleged that he carried on his trade *in an honest and lawful manner*; and the evidence tended to negative that averment, by shewing the trade not to be lawful, not merely by shewing the libel to be true.

Lord Chief Justice TINDAL.—I think the letter in ques-

(a) 2 *Starkie on Evidence*, 442, n.

tion was admissible for the purpose and to the extent to which it was offered to the consideration of the jury. That purpose was, to shew that the wife of the plaintiff, at the time the letter was written, retained her affection for her husband, and was not dissatisfied at being left in *Canada* whilst he came to this country; it having, in the course of the trial, been insinuated by the counsel for the defendant, that the parties were not living together on very affectionate terms, and that the wife felt aggrieved at being left abroad.

Two objections were urged to the admissibility of the letter—first, that it would be extending the rule laid down in all the cases touching the epistolary communications of the wife in cases of this sort; such rule being, as it was contended, expressly confined to letters written by the wife to the husband; whereas here the letter was addressed to a third person—secondly, that the letter was not confined to general expressions of affection and regard, but contained statements of specific facts calculated to move and to influence the minds of the jury.

With respect to the first objection, let us see what were the questions arising at the trial. One contention on the part of the defendant was, that Mrs. *Willis* was displeased with her husband for having left her in *Canada* whilst he visited *Europe*. Now, it is quite clear that evidence might have been given of verbal declarations made by her upon the subject—evidence as to the fact of her having been left behind with her own consent. If her declarations *ore tenus* would be good evidence of her remaining abroad of her own free will, and of her continued affection for her husband, why should not a letter to the like effect addressed to a third person (which is but a conversation reduced to writing between parties distant from each other), be evidence of the same facts? Such evidence, indeed, seems to me to be even less objection-

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able; for, a letter is less liable to misrepresentation than a mere verbal conversation. Neither do I trace any difference in principle between letters written by the wife to a third person, and those addressed to her husband. Perhaps the former would be less open to the charge or suspicion of collusion. Upon the whole, it does not appear to me, that, by holding this letter to have been properly admitted in evidence for the purpose for which it was produced, we shall be carrying the rule any further than the decided cases have already carried it.

The second objection is, that the statements contained in the letter were statements of specific facts, and were of necessity calculated to influence the minds of the jury. I admit that such is their natural tendency; and if they had been offered to the jury solely with that view, their admission would have been improper. The jury were, however, cautioned not to allow themselves to be influenced by the particular facts alluded to. The object of the plaintiff in producing the letter was merely to shew the state of the writer's feelings towards him at the particular period. The letter contained abundant expressions of a general nature, tending to shew the degree of affection she at that period entertained for her husband: in the course of it, after suggesting means which she deemed practicable for the purpose of relieving his embarrassments, she writes—"I earnestly intreat you to forward this plan as much as you can, and thus procure me one of the greatest pleasures the money could ever afford me—of being able to forward in any degree, however trifling, the happiness or benefit of my husband:" and, in another part of her letter, she says—"it will afford me more real gratification than I can express." Such expressions as these, descriptive of the feelings of the wife towards her husband, were surely not to be withheld from the consideration of the jury; though I admit the extreme difficulty of giving effect to those parts of the letter which are

evidence, and excluding those which perhaps in strictness are not. In many instances, however, evidence which is only admissible for one purpose, incidentally comes in aid of another; and such is the infirmity of all human tribunals, that it is difficult, or probably impossible, altogether to guard against its effects.

For these reasons, I am of opinion that the defendant is not entitled to a new trial upon either of the grounds of objection urged.

Mr. Justice PARK.—I am of the same opinion. There are many pieces of evidence that may properly be admitted in one part of a cause and not in another. In the present case, it was insinuated, on the cross-examination of the plaintiff's witnesses, that the plaintiff's wife had been left abroad contrary to her inclination; and that in fact they were a very unhappy couple. The letter in question was offered with a view to meet those insinuations. It was written about three or four months before the criminal intercourse was alleged to have taken place. No collusion could be suggested. The case comes within the principle of *Trelawny v. Coleman*, where Mr. Justice *Holroyd* held that proof that a letter produced corresponded as to its contents with a letter which the wife wrote to her husband whilst she was absent from him (before the criminal intercourse), upon a visit at the house of a friend, and which she read over to the witness, was sufficient to warrant the reception of the letter in evidence. The present was a much more fit case for the admission of such evidence than that. Letters written to the husband are much more liable to the suspicion of collusion, than letters written to a third person. Letters from the wife to a third person, are more likely to contain the spontaneous effusions of her mind. In the case of *Edwards v. Crock*, Lord *Kenyon* was clearly of opinion that letters from the wife to the husband were admissible to shew the feelings of the par-

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ties towards each other. But it has been contended that there the letters were admitted on the ground of necessity. The like necessity equally exists in the present case. With regard to the letter itself, independently of the specific facts objected to, I never read a more kind and delicate and affectionate letter. The true object of the writer appears to have been, to procure an alteration to be made in her marriage settlement, for the benefit of her husband. She says—"I earnestly intreat you to forward this plan as much as you can, and thus procure me one of the greatest pleasures the money could ever afford me—of being able to forward in any degree, however trifling, the happiness or benefit of my husband." Could it be said, that, if Mrs. *Willis* had come to *England* and said something tantamount to this, such declarations would not have been admissible in evidence to shew the degree of affection and regard she then entertained towards her husband? It is admitted, on the part of the defendant, that this piece of evidence was very guardedly left to the jury. Proof of this sort is not to be rejected, notwithstanding certain parts of it, which cannot be altogether withdrawn from the consideration of the jury, may be calculated to operate with undue weight. In the case of a confession by one of two prisoners, which frequently inculcates the other, the confession of the one cannot on that account be withheld from the jury: but the Judge always cautions them to apply it only to the individual making it. And in the case of *Manning v. Clement* (a), lately decided in this Court, where, in an action for a libel, the plaintiff alleged in his declaration, that, at the time of the publication, he exercised and carried on, in a lawful manner, the trade and business of a manufacturer of bitters, with which, in the way of his business, he supplied various licensed publicans, it was held, that evidence might be given under the general issue,

(a) 5 Moore & P. 211; S. C. 7 Bing. 362.

with reference to the allegation of the legality of the trade or business of the plaintiff, that what he sold was not bit-
ters, but a deleterious composition, for the sale of which
he had been prosecuted in the Court of *Exchequer*; al-
though the evidence incidently established the truth of the
libel.

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Mr. Justice GASELEE.—I am also of opinion that the let-
ter in question was properly admitted. In *Trelawney v.*
Coleman, letters written by the wife to the husband (while
living apart from each other), proved to have been written
at the time they bore date, and when there was no reason
to suspect collusion, were held to be admissible in evidence
for the purpose for which the letter in this case was pro-
duced. That being the rule, I cannot discover why a let-
ter addressed to a third person is not equally admissible.
This letter appears to have been written in *July*, 1828,
shortly after the husband had left *Canada*; and in it the
wife expresses herself with the greatest possible kindness
towards her husband. In *Trelawney v. Coleman*, Mr. Jus-
tice *Hobroyd* says (a)—“The intent of reading the letter
in evidence is, to shew what was the state of the wife’s
mind and affections at the time when the letter was written.”
Now, what can more strongly shew the affectionate regard
of Mrs. *Willis* for her husband at the period in question,
than the desire she evinces to deprive herself of property
settled upon herself, to relieve him from his embarrass-
ments?

Mr. Justice ALDERSON.—I cannot see how this case is
in principle to be distinguished from *Trelawney v. Cole-*
man. In that case there was no evidence to shew for what
reason the plaintiff and his wife were living apart; but here
the separation of the parties is accounted for; the absence

(a) 2 Stark. N. P. C. 193.

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of the plaintiff is entirely explained, consistently with that mutual affection and esteem which ought to subsist between husband and wife. If, as was held in *Trelawney v. Coleman*, the contents of a letter written by the wife to her husband may be proved by a third person, to whom she had read them, I cannot see why, upon the same principle, letters written by her to third persons are not equally admissible. The wife's letters to her husband are held to be in the nature of conversations between them. Lord *Ellenborough* says (a)—“What husband and wife say to each other is, beyond all question, evidence to shew their demeanor and conduct, whether they were living on better or worse terms; what they write to each other may be liable to suspicion, but, when that is cleared up, that ground of objection fails.” So, conversations of the wife with third persons would be evidence. It must therefore follow, that what she writes to the same purport is also evidence. The letter does certainly contain matters which were not admissible in evidence; but in all these cases the only course that can be adopted is, to caution the jury to take into their consideration only the general expressions of good will, and to reject the specific facts contained in the letter; and they must not be supposed to be incapable of rejecting from their minds that which ought not to weigh with them. Upon the whole, I think that the letter in question, accompanied with the caution which the learned Judge gave to the jury, was properly submitted to them.

Rule discharged.

(a) 1 Barn. & Ald. 91.

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DOE *d.* JAMES *v.* ROE.Monday,
May 7th.

MR. Serjeant *Wilde* moved for judgment against the casual ejector, on an affidavit that the tenant in possession could not be found, and that the declaration and notice had been served in the usual manner upon a servant upon the premises, who was desired to deliver it to his master, and afterwards stated that he had done so.

Service of declaration, and notice in ejectment, where the tenant is not to be found.

Rule granted.

HENRY LAMBIRTH and PORTER *v.* ROFF.Tuesday,
May 8th.

THIS was an action of *assumpsit* brought to recover a balance of 63*l.* 1*s.* 4*d.*, due from the defendant to the plaintiffs, wine and spirit-merchants, upon the balance of an account for wines and spirits supplied by them. The cause was tried before Lord Chief Justice *Tindal*, at the Sittings at *Westminster* after the last term. The facts were as follow:—

A misdescription in the particular of the debt sought to be recovered, will not warrant a nonsuit, unless the defendant is misled thereby.

The plaintiffs carried on the business of wine and spirit merchants at *Writtle*, in the county of *Essex*, under the firm of *Lambirth & Porter*. The plaintiff *Henry Lambirth* also carried on the business of a brewer on his separate account at *Writtle*; and *Henry William Lambirth* and one *English* also carried on the business of brewers at *Little Stainbridge*, in the same county. The defendant held a public house at *Prittlewell*, near *Chelmsford*, under an agreement with these four individuals. In the course of his business, the defendant had dealings with *Lambirth & English* for porter, and also with *Lambirth & Porter* for wines and spirits; and, at the time the action was brought, he stood indebted to both firms. The particular of the plaintiffs' demand was as follows:—

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"This action is brought to recover the sum of 63*l.* 1*s.* 4*d.*, being the balance of a debt due from the defendant to the plaintiffs, for goods sold and delivered by the plaintiffs to the defendant *in their trade or business of brewers*, at various times before the commencement of this action, &c."

The plaintiffs proved the delivery of the wines and spirits for which they sought to recover; and it also appeared that their collecting clerk had called upon the defendant, when the account for wines and spirits was agreed to. It was objected, on the part of the defendant, that the evidence was not consistent with the particular, but disclosed a totally different cause of action—the particular being for a supposed debt due to the plaintiffs in their trade or business of *brewers*, and the proof of a demand as spirit dealers.

A verdict was taken for the plaintiffs, for the amount claimed, and leave reserved to the defendant to move to enter a nonsuit upon the above objection.

Mr. Serjeant *Lawes*, accordingly, on a former day in this term, obtained a rule *nisi*, upon affidavits stating, that, by the evidence given at the trial, the defendant was taken by surprise, not being prepared to defend himself against a wine and spirit account, although he would have been prepared, and had a defence to a beer account.

Mr. Serjeant *Stephen* shewed cause.—He produced affidavits which detailed a variety of circumstances to shew the impossibility of the defendant's being misled by the particular; and, amongst others, several letters addressed to him by the plaintiffs and their attorney, demanding the debt for which this action was brought, and describing it as a debt due to *Lambirth & Porter*, of *Writtle*, for wines and spirits. He submitted that there was no distinct allegation in the affidavits on the part of the defendant, that

he had been misled, which the Court would require before they yielded to such an objection.

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The Court called upon—

Mr. Serjeant *Lawes* and Mr. Serjeant *Bompas* to support the rule.—The object of the rule of *Trinity* Term, 1 *Will.* 4 (a), will be entirely frustrated if a particular like this be held sufficient. In *Macarthy v. Smith* (b), it was held, that, under a particular for goods sold and delivered, the plaintiff could not recover for money had and received, although the goods had been delivered upon condition—sale or return—and part of them had been sold by the defendant, and the money received by him. As, therefore, the bill of particulars in this case did not correspond with the real cause of action, and the defendant might have been, and in fact was, misled thereby, the plaintiffs ought to have been nonsuited.

Lord Chief Justice TINDAL.—It is clear that there has been culpable negligence on the part of the plaintiffs' attorney, but the true principle in these cases is, not whether the cause of action has been improperly or mistakenly described, but whether the defendant has been misled. In the particular annexed to the declaration in the present case, the debt is described to be due to the plaintiffs in their trade or business of *brewers* instead of *spirit-merchants*. It appears to me that the only question we have to consider is, whether, under the circumstances of the case, as disclosed by the evidence at the trial, and by the affidavits in support of and against this motion, the defendant has or has not really been misled or taken by surprise. I cannot think that he was surprised or defeated of his ground of defence. The letters written to the defen-

(a) Rule 6. See 5 Moore & P. 815. (b) *Ante*, p. 227; S. C. 8 Bing. 145.

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dant by the plaintiffs and their attorney, threatening him with proceedings unless he settled their demand, stated the debt to be due on the wine and spirit account. It appears to me, therefore, that the ground of the motion fails; and that it would be too much to say that every slight variance in the particulars, where there is no apparent deception, and the defendant is not misled by it, shall be visited with a nonsuit. Such a practice would pervert the bill of particulars into a mere trap for plaintiffs. I therefore think this rule should be discharged.

Mr. Justice PARK.—I yield to the opinion of my Lord Chief Justice, but with very great reluctance. The attorney has been guilty of extreme negligence.

Mr. Justice GASELEE.—I concur in the decision that has been pronounced, though at the same time I am by no means satisfied that we have come to a proper conclusion. If the defendant, however, had any set-off on the beer account, he should have shewn it by his affidavit. Upon the whole it is clear that the defendant must have known that the action was brought to recover the debt due from him for wines and spirits.

Mr. Justice ALDERSON.—The proper test to be applied to cases of this sort has been stated by my Lord Chief Justice, *viz.* whether the particular is calculated to mislead the party for whose information it is designed. It is the duty of the Court to prevent any slight error in the particular from being unfairly taken advantage of. A contrary doctrine would have the effect of converting the bill of particulars, which is given for the benefit and information of the defendant, into an engine of fraud, to entrap the plaintiff. The case of *Davis v. Edwards* (a) was

much stronger than the present. There, the particular, in an action of debt for rent, described the lands as of a wrong parish, and yet it was held that the plaintiff might recover, it not appearing that any misrepresentation was intended, or that the defendant held more than one parcel of land of the plaintiff, so as to be misled by it. The Court there looked, not at the mere form, but at the substance of the thing. We must do the same in this case. Here, letters were written by the plaintiffs and by their attorney, before the action was brought, correctly describing the nature of their demand. These letters were followed up by a writ; and, after the arrest, the plaintiffs again wrote to the defendant explaining to him that he was arrested for the balance due to them for wines and spirits. Besides, the plaintiffs, *Lambirth & Porter*, were known to the defendant to be wine and spirit dealers only, and not brewers. He could not possibly, therefore, be deceived or misled by the particular.

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 v.
 ROY.

Rule discharged (a).

(a) See *Harrison v. Wood*, ante, p. 536.

TEMPERLEY v. SCOTT.

Wednesday,
 May 9th.

THIS was an action of *assumpsit* on a policy of assurance. The trial, which had been twice postponed at the instance of the defendant, came on before Lord Chief Justice *Tindal*, at the sittings in *London* after the last term, when the plaintiff was nonsuited. A few days before the trial, the defendant applied for leave to withdraw his plea and pay money into Court; upon which occasion Mr. Justice *Gaselee* made an order, that, in any event, the costs up to that time should be paid by the defendant.

The Court approved the allowance, on taxation, of subsistence money for a witness, the captain of a ship, from the service of the *subpoena* till the time of trial.

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The Prothonotary, on taxing the plaintiff's costs, allowed a sum of 8*l.* *per* month for the subsistence of a witness of the name of *Grewcock*, a captain of a ship, for the whole period of his detention as a witness in the cause, and for the loss of a voyage by the witness in the interim—it appearing that the plaintiff had actually paid *Grewcock* 10*l.* *per* month during the whole of that time; and that the plaintiff had, in *March*, 1831, proposed to take his examination upon interrogatories before the Prothonotary, but that the defendant's attorney said that he would rather have the witness in Court than consent to his examination upon interrogatories.

Mr. Serjeant *Wilde*, on the part of the defendant, on a former day in this term, obtained a rule *nisi* that the Prothonotary might review his taxation, on the ground that the allowance for the subsistence of the witness was improper.

Mr. Serjeant *Taddy* now shewed cause.—In *Berry v. Pratt* (a), it was expressly determined, that, where a sea-faring man remained in this country in order to give evidence in a cause, the Master, on taxation of costs, was justified in allowing him a subsistence from the time of the service of the writ until the trial. The Court there said: “The witness was a sea-faring man; and, unless detained for the purpose of giving evidence, might again have gone to sea, and then the parties might have been put to a far greater expense by the postponement of the trial, on account of his absence. There would also have been some danger of his evidence being altogether lost by the various casualties to which sea-faring men are exposed.” That case is clearly in point. In *Lonergan v.*

(a) 1 Barn. & Cress. 276; S. C. 2 Dowl. & Ryl. 424.

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The *Royal Exchange Assurance Company* (a), this Court allowed the plaintiffs for the expenses of bringing over a witness from the *Havannah*, and for his detention here and return home. Mr. Justice *Park* there said: "The plaintiffs had a right to require the personal attendance of the captain of the ship, as he was the most material witness to prove whether she were sea-worthy or not at the time she sailed from the *Havannah*; and, after his arrival in this country, they were justified in detaining him, as his examination on interrogatories would of necessity be far more unsatisfactory than his *visá voce* examination in open Court, where his testimony would be obtained in a more full and perfect manner."

Mr. Serjeant *Wilde*, in support of his rule.—In *Loneragan v. The Royal Exchange Assurance Company*, the allowance was for subsistence and travelling expenses only; but here the Prothonotary has allowed the witness a compensation, in addition, for the loss of a voyage. In this he was not warranted. It is clearly settled that an *English* witness is not allowed a compensation for loss of time. This principle has even been extended to the case of an attorney; for, in the late case of *Collins v. Godefroy* (b), it was decided that an attorney who has attended on *subpœna* as a witness in a civil suit, cannot maintain an action against the party who subpœnaed him, for compensation for loss of time. Lord *Tenterden* there said: "If it be a duty imposed by law upon a party regularly subpœnaed, to attend from time to time to give his evidence, then a promise to give him any remuneration for loss of time incurred in such attendance is a promise without consideration. We think that such a duty is imposed by law; and, on consideration of the statute of *Elizabeth* (c), and of the cases which have been

(a) 5 Moore and Payne, 447;
S. C. 7 Bing. 725, 729.

(b) 1 Barn. & Adolph. 950.
(c) 5 Eliz. c. 9, s. 12.

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decided on this subject, we are all of opinion that a party cannot maintain an action for compensation for loss of time in attending a trial as a witness. We are aware of the practice which has prevailed in certain cases, of allowing, as costs between party and party, so much *per day* for the attendance of professional men; but that practice cannot alter the law." Is the hazard of the plaintiff not having the witness ready to produce at the trial to be put in competition with the enormous expense of keeping him during the whole time the cause may be pending? The measure of inconvenience that may result to the plaintiff from such a casualty bears no proportion to the great charge the detention of the witness might entail on the other party.

Lord Chief Justice TINDAL.—It appears to me to be unnecessary in this case to agitate the general question that has been argued, as to the plaintiff's right to claim before the Prothonotary an allowance for the loss of time of the witness. Looking at the sum that has been allowed for the subsistence of *Grewcock*, we cannot say that it is extravagant; it was certainly not more than was proper and necessary for the board and lodging of a person in his sphere of life. It appears, however, that, when the witness was first subpœnaed, an offer was made by the plaintiff to take his examination upon interrogatories, in order to avoid the expense of detaining him; and that the defendant's attorney refused to accede to this offer, saying that he would rather have him examined in Court. This reduces it to the simple case of a bargain between the parties. I therefore think there is no ground for sending the matter back to the Prothonotary.

Mr. Justice PARK.—I am of the same opinion. The plaintiff proposed to examine the witness upon interroga-

tories under the statute (a). The defendant refused to accede; and the witness was consequently detained. The sum that has been allowed by the Prothonotary is extremely reasonable; not more than was absolutely necessary for subsisting the witness.

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The rest of the Court concurring—

Rule discharged.

(a) 1 Will. 4, c. 22.

JESSEL v. MILLINGEN.

MR. Serjeant *Wilde* moved for a rule calling on the defendant to shew cause why the plaintiff and his attorney should not be at liberty to inspect and take a copy of the agreement, document, or paper writing relating to this cause, in the custody, power, or possession of the defendant or his attorney, if any such there was. The affidavit of the plaintiff upon which the motion was founded, stated, that, in a conversation he had with the attorney for the defendant since the action had been commenced and stood for trial, the said attorney stated to the deponent that he, the attorney, had in his possession a document bearing his, the deponent's, signature, that when produced, would put an end to the cause: and the deponent positively denied that he ever did, to his recollection and belief, sign any document, agreement, or paper writing, to the effect stated by the attorney; and that, if any such agreement, document, or paper writing were in existence, he, the deponent, was positive, should such agreement, document, or paper writing purport to bear the deponent's signature, that the same was a forgery.

Thursday,
May 10th.
 The Court refused to allow the plaintiff to inspect a document in the hands of the defendant, alleged by his (the defendant's) attorney to be signed by the plaintiff, and to afford a perfect defence to the action, upon an affidavit of the plaintiff, that, if such document existed, and purported to be signed by him, the signature was a forgery.

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v.
MILLINGEN.

The learned Serjeant submitted that justice required that the plaintiff should have the inspection he prayed, and that it was in the discretion of the Court to grant it, to avert the necessity for a bill in equity, which would give the relief now sought, though in a more circuitous and expensive mode.

Lord Chief Justice TINDAL.—I am not aware of any instance in which that which is prayed in this case has been granted, and no authority has been cited in support of the application; but it seems to me, that, in assenting to it, we should be extending the general rule which obtains on this subject very much beyond that which justice requires. Inspection of documents in the custody of an adversary, is only permitted where they are to some extent the property of both parties, as in the case of an agreement of which there is but one copy; there, the party who holds it, holds it as trustee for the other. But, by the present motion, the plaintiff seeks to compel the defendant to shew the nature of his defence to the action. Mere idle words dropped by the attorney ought not to be made a pretext for such an application. If the fact be as the plaintiff swears, then there is no document in existence bearing his signature; and if such thing does exist, he ought to be aware of it.

The rest of the Court concurring—

Rule refused.

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Thursday,
May 10th.*Ex parte TINDAL.*

BY a settlement made on the marriage of his daughter with *William Smith*, *Edward Gray* covenanted to pay to *William Smith*, immediately upon the marriage, 2,300*l.*, for his own absolute benefit, and a further sum of 4,000*l.* was agreed to be paid to *Smith* within twelve months after *Gray's* decease. *William Smith* on his part covenanting to secure to his wife 80*l.* *per annum* for her separate use, and, within twelve months after his decease, to cause 4,000*l.* to be paid to her trustees, with interest from the time of his death, in trust to pay the interest and annual produce to his wife for her life, in case she survived him; and, after her death, in trust to pay and assign the money, and the interest and annual produce thereof, to, between, and amongst the child and children of *Smith* and his wife, in manner thereafter mentioned; and, if they should have no child or children, to the survivor of them the said *William Smith* and his wife, his or her executors, administrators, or assigns.

The 2,300*l.* were accordingly paid on the marriage, and the 4,000*l.* shortly after *Gray's* decease. The provision made for the wife was to be in lieu of dower.

William Smith having become bankrupt and his wife being still alive, *Tindal*, the trustee under the settlement, applied to prove the value of the 4,000*l.* covenanted to be paid by the executors of *Smith* within twelve months after his decease, under the 56th section of the statute 6 *Geo.* 4, c. 16(a). The proof was rejected by the commissioners.

should be, the present worth of 4,000*l.* payable twelve months after the death of the bankrupt.

W. S., by settlement made on his marriage, covenanted that his executors should, within twelve months after his decease, pay to his wife's trustees 4,000*l.* with interest from the time of his death, in trust to pay the interest to the wife for her life in case she survived him, and, after her death, the principal to be divided between the children of the marriage; and, if they had no child or children, to the survivor of them, *W. S.* and his wife, his or her executors, &c. *W. S.* became bankrupt, the wife being still alive:—*Held*, that the covenant to pay the 4,000*l.* was a debt payable upon a contingency, within the meaning of the statute 6 *Geo.* 4, c. 16, s. 56; and that the valuation

(a) By which it is enacted—
“That, if any bankrupt shall, before the issuing of the commission, have contracted any debt payable upon a contingency which shall not have happened before the

issuing of such commission, the person with whom such debt has been contracted may, if he think fit, apply to the commissioners to set a value upon such debt; and the commissioners are hereby re-

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The Vice Chancellor, Sir *L. Shadwell*, on petition, directed that the proof should be allowed (*a*). The decision of the Vice Chancellor was afterwards reversed by the then Lord Chancellor, Lord *Lyndhurst* (*b*); and the petition came on for a re-hearing before the present Lord Chancellor, Lord *Brougham*, on the 27th *August* last (*c*); on which occasion his Lordship required the assistance of Lord Chief Justice *Tindal* and Mr. Justice *Littledale*. Their opinion (in which the Chancellor concurred) was now delivered by—

Lord Chief Justice TINDAL.—There are two questions in this case—*first*, whether the bankrupt has contracted a debt payable on a contingency within the meaning of the 56th section of the statute 6 *Geo.* 4, c. 16—*secondly*, supposing that he has done so, whether the commissioners can set a value upon the debt so as to make it the subject of proof under the commission.

On the first question, it is contended, on behalf of the assignees, that the contract entered into by the bankrupt is not a debt, but merely a covenant that the executors of the bankrupt shall pay a sum of money on a collateral event; that the only effect of that contract is, to create a charge on his assets; and that such was all that the parties themselves contemplated by the settlement, as the bankrupt himself could never have been liable to pay the money; that the parties themselves took the chance of what the assets might produce—a chance which, in some cases,

quired to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or, if such value shall not have been so ascertained before the contingency shall have happened, then such person may, after such

contingency shall have happened, prove in respect of such debt, and receive a dividend with the other creditors, not disturbing any former dividends.”

(*a*) 1 Mont. & M'Arth. 415.

(*b*) Ibid. 422.

(*c*) 1 Mont. & Bligh, 375.

might be more beneficial to the wife and children; because, if the husband should become bankrupt, and afterwards acquire property, they would have the benefit of the provision in full, instead of a dividend, very much diminished as it must be by the calculation of the contingency. But we are of opinion that the contract contained in the settlement is a debt which the bankrupt has contracted within the meaning of the 56th section of the bankrupt act.

A covenant to pay a sum of money constitutes a debt; and an action of debt, technically so called, may be maintained upon it (*a*), *Ingledeu v. Cripps* (*b*); for, though in the case last cited there was a penalty, yet the language of the Court is, that debt will lie on a covenant to pay a sum of money; and it is a common practice to draw declarations in debt on a covenant to pay a sum of money. And if a man covenants that his executors shall pay a sum of money after his death, that also appears to us to create a debt; and we think it just as much so as if he had covenanted to pay it himself. *Plumer v. Marchant* (*c*). In that case, the testator covenanted that he would leave by his will, or that his executors or administrators should, within six months after his death, pay a sum of money to trustees for the benefit of his wife and children; and, an action being brought against the administrator on a bond of the testator, he pleaded *plene administravit*; and the question was, whether he could retain the moneys covenanted to be paid: all the Court held that this was a *debt* which might be retained. It is true there was a *penalty*, on which debt would lie, but the Court only noticed that incidentally; and it is plain that their judgment would have been the same if there had been no penalty.

There may be a doubt whether an action of debt, technically so called, would lie against executors upon such a

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(*a*) 1 Leonard, 208; Com. Dig.
tit. "Debt," (A. 4.)

(*b*) 2 Lord Raym. 814.

(*c*) 3 Burr. 1380.

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covenant, because debt would not have lain against the testator himself—*Wentworth's Office of Executors* (a)—*Perratt v. Austin* (b); though Lord Mansfield, in *Plumer v. Marchant*, above cited, speaks very lightly of the case of *Perratt v. Austin*, and, even in the case itself, there is a note at the end, making a *quære* to one of the reasons. But those authorities are merely to the form of the action—whether it should be debt or covenant—and do not affect the substance of the case, which is, whether a sum of money is payable by the contract: and in the case referred to in *Leonard's Reports*, it is said that the word *covenant* sometimes sounds in covenant, sometimes in contract, according to the subject-matter. The case of *Lee v. D'Aranda and Cox* (c) was cited to shew that a covenant that a man's executors should pay, was the same as a covenant to leave a sum of money, and that the latter did not create a debt; but, without considering whether, at law, at least, a covenant that a man's executors shall pay be for all purposes the same thing as a covenant that he will leave, the case of *Lee v. D'Aranda and Cox* was upon a question whether a widow should have the benefit of such a covenant, and also of the distributive share, *pro tanto*, of her husband's estate—a question on the point of double satisfaction. Many similar cases have occurred, all of which were considered in *Goldsmid v. Goldsmid* (d). But we do not form our opinion upon the technical ground that an action of debt will lie in point of form; but upon the substance and effect of an absolute covenant that a man's executors shall pay a sum of money to certain persons upon certain trusts, which, in our opinion, constitutes a debt.

Then, if it be a debt contracted, there is no doubt but it is payable on a contingency. There is one contingency as to the distance of time at which it is payable, depending

(a) Page 232.

(b) Cro. Eliz. 232.

(c) 1 Ves. sen. 1; 3 Atk. 419.

(d) 1 Swanst. 211.

upon the life of the bankrupt; and another, the wife or any of the children being alive at the death of the bankrupt, so as to be entitled to the benefit of it. It is possible that the contingency as to who shall have the benefit of it may never happen at all, which would be the case if the wife should be dead, and there should be no children at the death of the bankrupt.

But it has been urged that this is not a contingent debt within the meaning of the act of parliament, because it is uncertain whether the debt will ever be payable or not. We think, however, that uncertainty affords no reason why it should not: neither the words nor the spirit of the act require such a restriction upon contingent debts. It surely would put too narrow a construction upon the words of this act, to hold that they are to be confined to cases where the event upon which the contingency rests must happen some time or other; and that, because such event may happen, the debt is not to be taken as payable on a contingency; for, though the debt may never *be paid*, it is nevertheless payable if the contingency does happen, and as such, it is, strictly and properly speaking, payable on a contingency.

One of the classes of contingent remainders is, where the contingency may never happen at all; and it is to be presumed that the legislature, in using the word contingency, meant that it should apply to such cases as upon other occasions are held to fall within the meaning of that term. Before the late act of parliament, a very extensive set of creditors claiming under marriage articles had, on various occasions, applied to prove debts under commissions of bankrupt, as appears by the cases of *Tully v. Sparkes* (a), *Ex parte Caswell* (b), *Ex parte Greenaway* (c), *Ex parte Groom* and *Ex parte Winchester* (d),

(a) 2 Lord Raym. 1646.

(c) 1 Atk. 113:

(b) 2 P. Wms. 497.

(d) 1 Atk. 115.

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Ex parte Mitchell (a), *Ex parte Barker* (b), *Ex parte Alcock* (c), *Ex parte Tuaffa* (d), and that class of cases. In many of these cases expressions are used of the hardship of trustees under marriage settlements not being able to prove under commissions of bankrupt. And there can be little doubt but that the legislature had in view the numerous class of cases of trustees under marriage settlements: and we think that the words of the present act of parliament are sufficient to reach these cases.

But the principal difficulty which has been urged in argument is, that no valuation can be made by the commissioners, within the meaning of the act. If the contingency depends upon the lives of persons in existence, and the order of time in which the various individuals may die, such contingencies are clearly reducible to a matter of calculation, and a valuation may be made of the present worth of the debt; but, if the valuation depends upon particular events which may or may not take place, and upon the lives of persons not now in existence, and where it is uncertain whether any such persons will ever come into existence, and, if *any* do, it is still uncertain *how many* there may be, and the valuation is to be made upon a contingency depending on such a complication of events, then indeed it may be admitted that no valuation could be set upon it, as there would be no possibility of bringing such a case within any rules of calculation. And in this particular case, if the calculation must necessarily depend on how many persons there should be connected with there being any children of this marriage, or upon the number of such children, if any, or on the time of the death of these uncertain children, then we should have thought that no valuation could be made of the debt in question, so as to admit it to proof. But we think the valuation is not to

(a) 1 Atk. 120.

(b) 9 Ves. 110.

(c) 1 Ves. & Bea. 176.

(d) 1 Glynn & Jam. 110.

depend upon the fact of there being any future children of the marriage, or upon the time of their death. It appears to us that such calculation ought to be made merely with reference to the time of the bankrupt's death; and that the valuation is to be simply this—the present worth of 4,000*l.*, payable twelve months after the death of the bankrupt.

The settlement contains a positive covenant that the debt is to be paid to the trustees at the end of twelve months after the death of the bankrupt. The trustees are therefore entitled to receive the whole at that time, as an absolute debt to themselves. They are directed, after receiving it, to lay out the money in securities mentioned in the settlement, and apply the interest and principal in the way therein directed; and, in the first instance, the wife is to have the whole for her life. That would be the state of things if *Smith* had not become a bankrupt. Then, how is it altered by the bankruptcy? Suppose the debt to the trustees had not been contingent, and had been payable immediately, the trustees would have proved for the whole debt, without reference to the fact whether there were children or not. Suppose the debt had been payable at a future day certain, then they would have proved for the whole debt, deducting a rebate of interest, and that also without reference to the fact whether there were children or not. But, this debt being payable at a future day which is uncertain, there can be no rebate of interest, and therefore a value is to be set upon it, and that value, it seems to us, should be governed upon the principle that the value should be put upon the whole debt, without reference to there being children. There being children or not ought not to affect the right of the wife to the interest for life in the first instance, and she cannot have the benefit of the whole debt, unless the value be taken in the way we have mentioned. If there are children, the trustees will divide the money amongst them, according to the terms of the settlement. And, as to these also, they are

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entitled to have the benefit of the whole debt, subject to the deduction as to the valuation. And if there are no children, the wife will take the debt by survivorship, reduced as it will be by the deductions before alluded to, and by the receipt of dividends under the commission only instead of the debt. In the event of the wife dying before the husband, and there being no children, there will be nobody to take, and then it will revert back to the husband's estate.

One argument adduced against admitting the present proof is, that this may, in certain events, be a proof for the benefit of the husband, and that therefore it cannot be received. If a proof was made for the immediate benefit of the husband, it would be nugatory to allow it to be made, because the benefit of it must go back to the estate. But if, in the multiplied limitations of a marriage settlement, some benefit may eventually arise to the husband, there can be no reason why the whole proof should on that account be rejected. Here, there are two ways by which the husband might be benefited—one, if the husband should survive the wife, and there should be no children. In that case, the money received as the dividend would go back to the husband's estate; but then the proof would not be considered as having been made for the benefit of the husband, but the whole proof would fall to the ground, and be as if it had never taken place; because the trusts of the settlement, as far as relates to the sum of 4,000*l.*, would not come into operation till after the death of the husband. Again, if the wife should die in the life-time of the husband, and there should be children who survived the husband, but they should die before they acquired vested interests, then, the husband having survived the wife, his executors would be entitled; but that collateral contingent interest to his executors could not be considered as rendering the proof a proof for the benefit of the husband, so as altogether to exclude it;

on the contrary, such beneficial interest vesting in the husband's executors, would form part of the estate of the bankrupt. The case of *Ex parte Grundy* (a) was nearly similar to the present; and in that case the trustees were allowed to prove. But, as the objection now under consideration was not made there, and the case was determined on the retrospective operation of the 6 Geo. 4, c. 16, that case cannot be adduced as an authority.

Upon the whole, however, upon the grounds and principles which we have above stated, we think the demand of the trustees in this case is proveable.

(a) 1 Mont. & M'Arth. 293.

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Ex parte CHUCK, in re STARKEY & WHITESIDE,
Bankrupts.

Thursday,
May 10th.

JOHN Cross Starkey and William Starkey carried on business in partnership as brewers. In the month of July, 1820, Whiteside, then a minor, advanced to the Starkeys a sum of 24,000*l.*, whereupon they all three executed a deed, by the express terms of which a partnership stock was created, in which they had all a joint property. Whiteside, however, was not to have any definite aliquot proportion of the profits; but he was to have an account of the profits as between themselves, and to get 2,000*l.*, or 2,400*l.*, a year, as the case might be, out of the clear profits. This deed was confirmed by Whiteside after he attained his majority; but his name never appeared to the world as a partner in the concern.

In the year 1826, the Starkeys became bankrupt. Two questions thereupon arose—*first*, whether Whiteside was

In 1820, *W.* advanced 24,000*l.* to J. C. S. and W. S., traders, and jointly with them executed a deed by the express terms of which a partnership stock was created in which they had all a joint property. *W.* was not to have any definite aliquot proportion of the profits, but was to have an account of the profits as between themselves, and to receive 2,000*l.* or 2,400*l.* a year, as the case might be, out of the profits.

W.'s name never appeared to the world as a partner. The firm became bankrupt in 1826:—*Held*, that *W.* was a partner in the concern, and that a joint commission against the three, as such joint partners, might be supported; and that the creditors of both the old and the new firm were equally entitled to prove against the estate of the latter.

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to be considered a partner with them—*secondly*, supposing him to have been a secret partner, whether the creditors of the old firm had, not only a claim against all the property of the new firm, but also a right to prove their debts to the exclusion of the creditors of the new firm, on the ground that, under the new firm, the *Starkeys* were the *apparent* and *reputed* owners of the whole property, with in the meaning of the statute 6 Geo. 4, c. 16, s. 72, having in their possession, order, and disposition, the property of *Whiteside*, with his consent (a).

The Lord Chancellor having requested the aid of Lord Chief Justice *Tindal* and Mr. Justice *Littledale* in the decision of these questions, the opinion of those two learned Judges was now delivered by—

Lord Chief Justice TINDAL.—The first question to be considered is, whether *William Whiteside* ever became a partner with *John Cross Starkey* and *William Starkey*, either as between themselves, or with respect to third persons; that is, whether there ever was any joint partnership stock belonging to all those three persons. And we are of opinion, that, by the deed of *July 20th, 1820*, confirmed by that of *March 2nd, 1821*, which was executed after *Whiteside* came of age, *Whiteside* did become a partner with the two *Starkeys*, both as between themselves and also with regard to third persons; and that, by the express terms of the deed of *July 20th, 1820*, there was a partnership stock created in which they had a joint property; and that, although *Whiteside* had not any definite aliquot proportion of the profits, yet that he was entitled to an account of the profits as between themselves, so as to get his 2,000*l.*, or 2,400*l.* a year, as the case might be, out of the clear profits; and that he was, to all intents and purposes, a partner, though his name did not appear

(a) See 1 Mont. 45. Ex parte Jennings.

(b) See the argument reported in 1 Mont. & Bligh. 364.

to the world; and that a joint commission against all the three, as such joint partners, might be well supported.

Whiteside, then, being thus a partner, but unknown as such to the world, any creditor of the three might at his election have maintained an action either against the two *Starkeys*, the known partners, or against them and *Whiteside* jointly, as appears by the cases of *De Mautort v. Saunders* and *Others* (a), *Ex parte Hamper* (b), and *Ex parte Norfolk* (c). And if an action had been brought against those three partners, it is clear that the joint effects of the partnership might have been taken in execution. And so also, generally speaking, the joint effects of the partnership would be distributable amongst the joint creditors under a joint commission of bankrupt against the three. And, unless there be something particular in this case, to vary it from such general principle, we should be of opinion that the joint creditors of the three are entitled to have the partnership effects divided amongst them. Thus, then, stands the claim of the joint creditors of the three partners.

The claim of the creditors of the two *Starkeys* under the old partnership must next be considered.

It is contended, on the part of those creditors, that, after the partnership with *Whiteside*, who was a secret partner, the two *Starkeys*, with the consent and permission of *Whiteside*, who had a share of the joint property, had his interest in such joint property in their possession, order, and disposition, and of which they were reputed owners, and took upon themselves the sole alteration and disposition as owners; and that, under the 6 Geo. 4, c. 16, s. 72, which follows the 21 Jac. 1, c. 19, s. 11, they are entitled to have the benefit of that interest of *Whiteside* under the commission. And for that doctrine they rely on the case

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(a) 1 Barn. & Adol. 398.

(b) 17 Ves. 403.

(c) 19 Ves. 455.

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of *Ex parte Enderby*(a), which they contend must be taken now to be the law on the subject, and to have settled all the former conflicting cases. To the authority of that case we entirely subscribe. In that case, the partnership had expired by effluxion of time, before the commission issued; in the present case, it continues up to the date of the commission: but we cannot think that circumstance makes any difference in principle between the two cases; and, in the present instance, if *Whiteside* had been solvent and able to pay all the creditors of the three, and a commission of bankrupt had issued against the two *Starkeys*, we do not think that he could have claimed to be entitled to his share of the joint effects, any more than *Enderby* could in his case.

It may be argued, however, that the rule of law laid down in that case may apply against the solvent partner himself, who is in default by suffering his share to remain in the possession and order of the bankrupts, and who therefore is excluded by the policy of the law from claiming any thing to the prejudice of creditors whom he may have been in part the means of misleading; but that it forms a very different question whether the same rule should be allowed to hold where the interest of the creditors of *Whiteside* is affected by its application, and where, in the present case, the creditors of the three have trusted the firm when *Whiteside's* 24,000*l.* formed part of the capital. But, upon the best consideration we can give to the subject, we think the principle of the case of *Ex parte Enderby* may and ought to be extended to a case circumstanced like the present.

The question therefore arises, whether, if the old creditors are entitled to treat this as a case within the 72nd section of the 6 *Geo. 4*, c. 16, they may not exclude all other

(a) 2 Barn. & Cress. 389; *S. C. nomine Gilpin v. Enderby*, 1 Dow. & Ryk. 570.

persons, on the ground that, if the funds of *Whiteside* have, under the circumstances, been placed in the hands of the two *Starkeys* contrary to the policy of the law, no person but the old creditors can prove. But we think they are not to have that privilege. In fact, the new creditors have a better right, upon principle, than the old creditors; because the new creditors trusted the firm on the faith of their apparent funds, including *Whiteside's* capital: whereas the old creditors never did trust them upon the faith of these funds, but only forbore to sue them upon the faith of their apparent stability. And, unless there be some principle which forbids different classes of creditors claiming upon the same funds, we think both sets of creditors ought to be permitted to prove; that is, the new creditors, on the ground of the funds belonging to persons whom they certainly trusted; and the old creditors, on the ground of the two *Starkeys* being the apparent owners of the whole.

Still further, if the creditors of the old firm claim to exclude the creditors of the new firm, another answer may be given, to which indeed we have already referred, *viz.* that, as *Whiteside* was a secret partner, the creditors of the new firm might have brought actions or sued out a commission of bankrupt against the two *Starkeys* (according to the cases of *De Mautort v. Saunders* and *Others*, *Ex parte Hamper*, and *Ex parte Norfolk*, before referred to); and then, as *Whiteside* was a dormant partner, and the two *Starkeys* were the apparent owners, the new creditors might have insisted on *Whiteside's* share being distributable under such a commission, and consequently would have the same right to insist upon *the apparent ownership* as the old creditors have.

We are therefore of opinion, upon the whole of this case, that both the creditors of the two *Starkeys* by themselves, and also the creditors of the two *Starkeys* and *Whiteside* jointly, should be admitted to prove *pari passu* upon the joint estate of the three.

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Then, supposing the old creditors are entitled to prove upon the joint estate, it is to be considered whether those who had notice of *Whiteside's* becoming a partner, can be admitted to the benefit of the proof. And upon that point, inasmuch as the proof is upon the ground of apparent ownership in the two *Starkeys*, we think it can make no real difference whether the old creditors knew of the change or not, inasmuch as none of the old creditors trusted the firm while *Whiteside's* property was in it, and therefore the knowing or not knowing of the change seems to us to make no difference. We see therefore no objection to these particular creditors being also allowed to prove, as well as the rest.

Thursday,
May 10th.

KEY and Another, Assignees of SHERWIN, a Bankrupt, v.
GOODWIN.

The defendant obtained a verdict in December, 1829. In the following term the plaintiff obtained a rule *nisi* for a new trial, which rule the Court afterwards directed to be suspended, to await the issue of another cause which involved the same point. The defendant died in November, 1830. The Court, after the lapse of two years and a half from the date of the verdict, allowed the judgment to be entered up *nunc pro tunc*.

THE defendant obtained a verdict in this case in December, 1829, and in *Hilary* Term following, the plaintiffs obtained a rule for a new trial. The cause ultimately stood over to await the decision of the Court in another case—*Key v. Shaw*—in which the same question was involved, viz. the bankruptcy of *Sherwin*. *Key v. Shaw* was twice tried, the verdicts on both occasions negating the acts of bankruptcy sought to be established (a). The defendant in this case died in November, 1830.

Mr. Serjeant *Wilde*, on a former day in this term, obtained a rule *nisi* to enter up judgment *nunc pro tunc*—as of *Hilary* Term, 1830. He moved on the affidavit of the attorney for the deceased defendant.

Mr. Serjeant *Taddy*, on behalf of the plaintiffs, opposed the motion, on the ground that the fact of the death of

(a) See the report of the motion for a third trial, *ante*, p. 462.

the defendant had never been communicated to the plaintiffs or their attorney, although a Judge's order had been made in the cause at the supposed instance of *Goodwin* so late as the month of *February* last; and that the application did not appear to be made on the part of the personal representatives of the deceased. He submitted, that, as the granting or refusing the prayer of the motion was entirely in the discretion of the Court, a better case should be made out by the applicant to induce the Court to interpose.

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Mr. Serjeant *Wilde*, *contra*, was stopped by the Court.

Lord Chief Justice TINDAL.—It appears to me that we should depart from the established practice of the Court if we refused this application. There are many cases where it has been laid down, that, where the proceedings have been stayed by the act of the Court itself, the parties shall not thereby be prejudiced. In the present case the defendant obtained a verdict. If all had proceeded regularly, he would have had judgment after the expiration of the first four days of the succeeding term. The Court, from the peculiar circumstances in which the cause stood, thought fit to suspend the rule. It would be manifestly unjust to allow the plaintiffs to take advantage of the defendant's demise in the interim. I see nothing in this case to vary it from the ordinary rule.

The rest of the Court concurring—

Rule absolute.

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The defendant warranted a horse sound wind and limb at the time of the contract. The horse had at that time a splint on the off fore leg, which did not then inconvenience him; but, by reason of its subsequent growth, and consequent pressure upon a sinew, it caused lameness in a few months. In an action for breach of the warranty, the jury were directed to say whether or not the horse was unsound at the time of the contract, or, if unsound, whether that unsoundness arose from the splint in question. The jury said, "that, although the horse exhibited no symptoms of lameness at the time when the contract was made, he had then upon him the seeds of unsoundness, arising from the splint:—*Held*, that the plaintiff was entitled to a verdict upon this finding.

MARGETSON v. WRIGHT.

THIS was an action of *assumpsit* for the breach of a warranty of a horse. The agreement signed by the parties upon the sale was as follows:—

"Mr. *Margetson* agrees to buy Mr. *Wright's* horse, *Sampson*, to pay him 40*l.* on delivery of the horse, and the further sum of 50*l.* on *May-day* next; and also to give Mr. *Wright* 10*l.* a time for the first five times the horse should win races in 1830; and the said Mr. *Wright* doth hereby warrant the said horse to be sound wind and limb at this time."

The horse was accordingly sent to the plaintiff, who put him in a course of training. He shortly afterwards became lame, and at the expiration of six months broke down. The plaintiff thereupon returned him to the defendant, and brought an action against him upon the warranty. On the trial of that action it appeared that the lameness was occasioned by a splint on the off fore leg, the existence of which was known to the parties at the time of the bargain. The learned Judge before whom the cause was tried left it to the jury to say, whether or not the horse was, at the time of sale, sound, and fit for ordinary work; and he told them, that, as the defendant had expressly warranted the horse to be sound wind and limb, he was responsible for the consequences of the splint; and that, as it was a defect of a doubtful nature, and might or might not have rendered the animal unsound, and there was no implied exception in the warranty, the defendant was bound by the terms of it. The jury thereupon found for the plaintiff. The Court afterwards directed a new trial, on the ground that the direction was too general, and had a tendency to mislead the jury (*a*).

Upon the second trial, before Mr. Baron *Vaughan*, at the last Assizes at *Appleby*, the evidence offered on the part of the plaintiff was, in substance, as follows: that a splint might or might not be the efficient cause of lameness, according to its position, its size, and extent; that the splint in this instance was in a very bad situation, as it pressed upon one of the sinews of the leg of the horse, and was calculated to produce, when the horse was worked, inflammation of the sinew, and consequent lameness.

The learned Baron desired the jury to tell him distinctly whether, in their judgment, the horse was unsound at the time of the contract; or, if they believed him to be unsound, whether that unsoundness arose from the splint of which evidence had been given. The jury said—"that, although the horse exhibited no symptoms of lameness at the time when the contract was made, he had then upon him the seeds of unsoundness, arising from the splint." The learned Baron thereupon directed a verdict to be entered for the plaintiff, for 40*l.*, the amount paid by the plaintiff, reserving to the defendant leave to move for a nonsuit.

Mr. Serjeant *Wilde*, accordingly, in last *Michaelmas* Term, obtained a rule *nisi* that this verdict might to be set aside and a nonsuit entered, to which he contended the finding entitled the defendant, the warranty being expressly limited to the time of sale, and the horse then being sound.

Mr. Serjeant *Spankie*, in the last term, shewed cause.—The warranty clearly protects the purchaser from the consequences of a latent defect in the animal, whence unsoundness may subsequently arise. The question is determined by the finding of the jury that the horse had in him the seeds of unsoundness at the time of the contract. Undoubtedly, where the unsoundness is obvious, such as blindness, or broken knees, the purchaser would not be pro-

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tected even by a general warranty of soundness (a): but here, the warranty extends to the consequences that might ultimately arise from the splint.

Mr. Serjeant *Wilde*, in support of the rule.—The warranty was expressly confined to the state of the horse at the time of the contract. The splint was a defect that was visible, and known to the plaintiff when he made the purchase; its ultimate effects could not be known at the time; and hence arose the insertion by the defendant of the words by which the warranty was limited in its operation, to the virtual exclusion of any future lameness that might ensue from the existence of the splint. The word “sound” was used in a limited sense. The case of *Liddard v. Kain* (a), is an authority in favour of the defendant. There, the seller informed the buyer that one of two horses he was about to sell him had a cold, but agreed to deliver both at the end of a fortnight, sound, and free from blemish; and at the expiration of that time the horses were delivered, but one had a cough and the other a swelled leg, which was apparent at the time of the sale. The buyer brought an action to recover the price, and a verdict was found for the seller. The Court refused to grant a new trial, holding that the warranty did not apply to the time of sale, but to a subsequent period.

Cur. Adv. Vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court:—

This was an action upon a warranty, in which the defendant warranted the horse to be sound wind and limb “at this time,” that is, at the time of the warranty made. The jury at the trial found a verdict for the plaintiff; the learned Judge requesting them to tell him distinctly whe-

(a) See *Liddard v. Kain*, 9 J. B. Moore, 356; S. C. Bing. 183.

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ther in their judgment the horse was sound; or, if they believed him to be unsound, whether that unsoundness arose from the splint of which evidence had been given. In answer to which inquiry, the jury said, "that, although the horse exhibited no symptoms of *lameness* at the time when the contract was made, he had then upon him the seeds of unsoundness, arising from the splint."

The question upon this application for a new trial, is, whether this finding of the jury sanctions the verdict for the plaintiff or not; that is, whether the Court can see with sufficient clearness that the jury thought that the horse was unsound at the time of the contract, and consequently that the warranty was broken. It appears that the evidence before the jury was, in substance, that a splint might or might not be the efficient cause of lameness, according to the position which it occupied, and its size and extent; that this splint was in a very bad situation, as it pressed upon one of the sinews, and would naturally produce, when the horse was worked, inflammation of the sinew, and consequent lameness. The jury, therefore, drawing their attention to the particular splint to which the evidence related, appear to us to have intended that this individual splint, though it did not at the moment produce lameness, was, at the time of the contract, of that sort, and in that situation, as to contain, in their language, the seeds of unsoundness, that is, the efficient cause of the subsequent lameness. If the lameness complained of had proceeded from a new or different splint, or from the old splint taking a new direction in its growth, so as to affect a sinew, not having been on one before, such a lameness would not have been within the warranty; for it would not have constituted a present unsoundness at the time of the warranty made. But the jury find that the very splint in question is the efficient cause of lameness.

On the former motion, our attention was not called to

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any evidence, if any such was given, as to the different nature and consequences of splints, which the learned Judge reports to have been given upon the present occasion; but it now appears that some splints cause lameness, and others do not, and that the consequences of a splint cannot be apparent at the time, like those of the loss of an eye, or any other blemish or defect visible to a common observer. We therefore think, that, by the terms of this written warranty, the parties meant that this was not at that time a splint which would be the cause of future lameness, and that the jury have found that it was.

We therefore think that the warranty was broken, and that the *postea* must consequently be delivered to the plaintiff.

Postea to the plaintiff.

5 Carr. P. 346. S. C. & NP.

Friday,
 May, 11th.

GARTH v. HOWARD and FLEMING.

The admission of a pawn-broker's shopman, that his master is in possession of goods, is not admissible in evidence against the latter, in an action of detinue, where the goods are not pledged in the ordinary course of the trade, that is, for an amount authorized by the statute 39 & 40 Geo. 3, c. 99.

THIS was an action of detinue, brought to recover the value of certain plate belonging to the plaintiff, which, it was alleged, had been pledged with the defendant *Fleming*, a pawn-broker, by *Howard*, who had been the plaintiff's agent. Pleas—first, *non detinet*—secondly, that the plate was pledged with *Fleming* by *Howard* by the authority of the plaintiff. The plaintiff took issue upon both pleas.

At the trial before Lord Chief Justice *Tindal*, at the Sittings in *London* after the last term, the only evidence to fix the defendant *Fleming* with the possession of the plate was as follows:—A demand having been made on *Fleming* by the plaintiff's attorney, *Fleming's* shopman called the next day at the attorney's office, and begged that no writ might be issued for a week or ten days, his

master being abroad. In the course of the conversation that ensued, the shopman admitted that *Fleming* had the plate, and at the same time said that it would be a hard thing upon his master to be obliged to give it up, as he had advanced 200*l.* upon it at five *per cent.* interest.

On the part of the defendants it was contended that this evidence was not admissible, the party making the admission not being the agent of the defendant *Fleming* for the purpose of the transaction to which the admission related; and that the shopman being merely an agent in the business of pawn-broker, which only extended to loans not exceeding 10*l.*, his employer was not bound by any thing he said.

His Lordship, after some hesitation, admitted the evidence, but reserved the objection for the opinion of the Court: and he left it to the jury to say whether or not a joint detention of the plate had been made out by the evidence.

The jury returned a verdict for the plaintiff for the value of the plate.

Mr. Serjeant *Andrews*, on a former day in this term, on the grounds of objection urged at the trial, obtained a rule *nisi* that this verdict might be set aside, and a new trial had.

Mr. Serjeant *Spankie*, on a subsequent day, shewed cause.—The action of detinue is founded in *tort*, and therefore the acquittal of one of two joint defendants will not deprive the plaintiff of his right to maintain the verdict against the other. Here, however, there was abundant evidence that the defendants were joint tort-feasors; both were contributory to the wrong done to the plaintiff. The admission of *Fleming's* shopman was clearly admissible in evidence. Where a party employs a man in the general management of his business in his absence, he

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constitutes him his agent for all the purposes of that business—*Hazard v. Treadwell* (a); and the law will presume every act of a servant to be done with the knowledge of his master—*Rex v. Almon* (b)—provided it be within the scope of his authority—*Schumack v. Lock* (c).

Mr. Serjeant *Andrews*, in support of his rule.—The pawn-brokers' act (d) only allows pledges to be taken to the value of 10*l.*; therefore the transaction out of which this action arose was not within the scope of the shopman's authority in his master's business of a pawn-broker. The authority of the shopman was exclusively confined to the general business of the shop of his employer, and to acts done by him in the shop. In *Maesters v. Abraham* (e), Lord *Kenyon* ruled that a letter written by an agent or broker by whom a contract has been made for the sale of goods, is not evidence where such agent or broker can be called as a witness. And in *Helyear v. Hawke* (f), Lord *Ellenborough* held, that, where a principal employs an agent or servant to sell for him, what such agent says as a warranty or representation at the time of the sale respecting the thing sold, is evidence against the principal; but not what he says at another time. The true principle is laid down by the Master of the Rolls (Sir *William Grant*), in the case of *Fairlie v. Hastings* (g): "The admission of an agent cannot be assimilated to the admission of the principal. A party is bound by his own admission; and is not permitted to contradict it. But it is impossible to say a man is precluded from questioning or contradicting any thing any person has asserted as to him, as to his conduct or his agreement, merely because that person has been an agent of

(a) 1 Strange, 506.

(b) 5 Burr. 2686.

(c) 10 J. B. Moore, 39.

(d) 39 & 40 Geo. 3, c. 99.

(e) 1 Esp. 357.

(f) 5 Esp. 72.

(g) 10 Ves. 127.

his. If any fact material to the interest of either party rests in the knowledge of an agent, it is to be proved by his testimony, not by his mere assertion. Lord *Kenyon* carried this so far as to refuse to permit a letter by an agent to be read to prove an agreement by the principal; holding that the agent himself must be examined (a).” So, in the present case, the transaction being wholly out of the scope of the agent’s authority, his admission was not receivable to charge his employer. The plaintiff therefore has failed in shewing a possession of the goods by the defendant *Fleming*, and consequently cannot sustain the action. The gist of the action being the detainer, it is necessary that the defendants should be in possession of the goods (b).

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Lord Chief Justice TINDAL now delivered the judgment of the Court:—

The rule in this case has been obtained upon two distinct grounds, but it is unnecessary to give an opinion upon any other than this, viz. whether the declaration of the shopman of the defendant *Fleming*, that the goods were in the possession of his master, was admissible; for, it is clear, that, unless *Fleming* is to be affected by such declaration, he is entitled to a verdict upon the general issue—*non detinet*. If the transaction out of which the suit arises had been one in the course of the ordinary trade or business of the defendant as a pawn-broker, in which trade the shopman was agent or servant to the defendant, a declaration of such agent, that his master had received the goods, might probably have been evidence against the master, as it might be held within the scope of such agent’s

(a) *Maesters v. Abraham*, 1 Esp. 2 Camp. 555.
357. And see *Palethorp v. Furnish*, 3 Esp. 511—*Peto v. Hague*, 5 Esp. 134—*Alexander v. Gibson*,
(b) 1 Selw. NI. Pri., 8th edit., p. 667—citing 2 Bulst. 308.

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authority to give an answer to such an inquiry made by any person interested in the goods deposited with the pawn-broker. In that case, the rule laid down by the Master of the Rolls in the case of *Fairlie v. Hastings* (a), which may be regarded as the leading case on this head of evidence, directly applies. But the transaction with *Fleming* appears to us not a transaction in his business as a pawn-broker; but was a loan by him as by any other lender of money, at five *per cent.* And there is no evidence to shew the agency of the shopman in private transactions unconnected with the business of the shop. I doubted much at the time whether it could be received, and intimated such doubt by reserving the point; and now, upon consideration with the Court, I am satisfied that it is not admissible. It is dangerous to open the door to declarations of agents, beyond what the cases have already done. The declaration itself is evidence against the principal, not given upon oath; it is made in his absence, when he has no opportunity to set it right, if incorrectly made, by any observation, or any question put to the agent; and it is brought before the Court and jury frequently after a long interval of time. It is liable, therefore, to suspicion originally, from carelessness or misapprehension in the original hearer; and again to further suspicion, from the faithlessness of memory in the reporter, and the facility with which he may give an untrue account. Evidence, therefore, of such a nature ought always to be kept within the strictest limits to which the cases have confined it: and, as that which was admitted in this case appears to us to exceed those limits, we think there ought to be a new trial.

Rule absolute.

(a) 10 Ves. 127.

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Friday,
May 11th.

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THIS was an action of *assumpsit* brought to recover the amount of certain fines alleged to be due from the defendant upon his admission to certain copyhold premises. The cause was tried before Mr. Justice *Alderson*, at the *Spring Assizes* for the county of *Suffolk*, in 1831, when a verdict was taken for the plaintiff, damages 182*l.*, subject to the opinion of the Court upon the following case:—

The lord of a manor having taken a *full fine* on the admittance of a tenant for life, is not entitled to another *full fine* upon the admittance of the remainder-man as tenant in fee, unless the imposition of such latter fine is authorized by a special custom of the manor.

“The plaintiffs are Lords of the manor of *Lakenheath*, in the county of *Suffolk*. By the custom of the manor, fines payable upon admission to lands parcel of the manor are arbitrary, but not exceeding two years’ annual value of such lands. The father of the defendant held certain premises, parcel of the said manor, as tenant for life thereof, under the will of the Rev. *John Barnes*, with remainder in fee to the defendant. The father of the defendant was admitted, under the said will, to the said premises, at a Court held on the 14th day of *October*, 1818, to hold the same to him and his assigns for life, with remainder as in the said will is mentioned; and he paid a full fine upon such admission. After the death of the tenant for life, the defendant, at a Court held on the 19th day of *May*, 1828, was admitted in fee to the premises so devised to him by the said will of the said *John Barnes*, in remainder, after the decease of his said father.

“In order to prove a special custom sufficient to warrant the claim of the plaintiffs to a fine in this case, *Hugh Robert Evans* was examined on their part. He had acted as steward of the manor for thirty-five years; and he stated that the custom of the manor was, for a tenant in remainder to pay a full fine upon his admission upon the death of tenant for life: but it appeared from his cross-exami-

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nation that his knowledge on this subject was derived entirely from an inspection of the different entries in the Court Rolls under his care, except that, during the time he had been steward, he had personal knowledge of two instances, and no more, of admissions of tenants in remainder after the deaths of tenants for life—being *Willet's* admission, hereinafter set forth, and *Payne's* admission, also hereinafter set forth. He gave no evidence of reputation, or declarations by deceased tenants of the manor, as to any such custom.

"The following extracts from the Court Rolls were then read in evidence on the part of the plaintiffs:—

"B. 6. P. 57. } *Frances Malt* admitted for life, under the will of
 7th Oct. 1735. } *John Malt*, to a cottage.

"And she paid her fine.

"B. 6. P. 74. } *Frances Malt*, spinster, admitted in remainder in fee,
 10th Oct. 1737. } on the death of the aforesaid *Frances Malt*, to the
 same cottage, under the same will.

"And she paid her fine."

"B. 6. P. 99. } *Mary Taylor* admitted for life under the will of
 11th May, 1737. } her mother, *Mary Secker*, to a messuage, rent —,
 and 22 acres of land, rent —.

"And she paid her several fines.

"B. 7. P. 60. } *Matthew Taylor* admitted in remainder in fee, on
 13th April, 1761. } the death of the said *Mary*, to the same premises.

"And he paid his fine."

"B. 7. P. 116. } *William Newton*, and *Alice*, his wife, admitted, to
 22nd April, 1771. } them and the longer liver of them, and the heirs of
 the said *Alice*, under the will of *John Evans*, to a
 messuage, rent 2s. 1d., and 7 acres, 2 roods, of fen,
 rent 1s., and 3½ acres of fen, rent 3d.

"And they paid their several fines.

"B. 9. P. 230. } *William Newton* admitted in fee, as eldest son and
 25th May, 1807. } heir-at-law of the said *Alice*, to the same premises.

"And he paid his fine."

"B. 4. P. 95. } *Mary Roper* admitted for life, under the will of *John*
 18th May, 1708. } *Roper*, to a messuage.

"Et sec. fin."

“‘B. 5. P. 60. } *William Roper* admitted in remainder in fee to said
27th April, 1721. } premises, after the death of said *Mary Roper*, under
the same will.

“‘*Et fecit fin.*’

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“‘B. 10. P. 20. } *Mary Willett* admitted for life, under the will of
3rd Oct., 1808. } *Anthony Willett*, with remainder over, as in the said
will mentioned, to a large estate.

“‘And she paid her fine.

“‘B. 10. P. 300. } *Anthony Willett*, for life, under the same will, and
31st Oct. 1821. } after the death of the said *Mary Willett*, then late
Mary Murrell, to the same estate (with remainder
over, as in the said will is mentioned).

“‘And he paid his fine.’

“‘B. 10. P. 10. } *Elizabeth Holmes* admitted for life under the will of
29th April, 1730. } her husband *Christopher Holmes*, to a cottage, rent
—, and piece of ground, rent —.

“‘*Et fecit sepal. fin.*

“‘B. 6. P. 159. } *Elizabeth*, the wife of *Robert Horne*, and daughter
10th April, 1744. } of the said *Christopher Holmes*, admitted in remain-
der in fee, on the decease of the said *Elizabeth*
Holmes, to the said cottage and piece of ground.’

“‘B. 6. P. 21. } *Susannah Harding* admitted for life, under the will
27th April, 1732. } of her husband *John Harding*, to 3a. 2r. Op. of ara-
ble land, 20 acres in *New Fen*, and 6 acres in *Stal-*
lode, a tenement and 4 acres of marsh called *Coats*
House.

“‘*Et fecit sepal. fin.*

“‘B. 7. P. 17. } *Robert Harding* admitted in remainder in fee after
7th Oct. 1751. } the death of *Susannah Harding*, his mother, to the
above six acres in *Stallode*.’

“‘B. 8. P. 114. } *Thomas Tunnell*, for life, under the will of *John*
8th April, 1782. } *Tunnell*, to a messuage and yard, 8 acres in *New*
Fen, 4 acres in *White Fen*.

“‘And he paid his fine.

“‘B. 9. P. 227. } *Simeon Mary Stewart Tunnell* admitted in remain-
20th May, 1807. } der in fee, on the death of said *Thomas Tunnell*, un-
der the will of said *John Tunnell*, to said 4 acres in
White Fen.

“‘And he paid his fine.’

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“ ‘B. 2. P. 42. } *Phillis Handeslip* admitted for life under the will of
28th April, 1671. } *William Handeslip*, her husband, to one acre of arable land in *Middle Field*, called *Butcher's Acre*, and three single half acres of arable land in *South Field*; and *John Handeslip* to the remainder in fee.

“ ‘*Et admissi sunt inde ten., et sec. fin.*’

“ ‘B. 4. P. 36. } *John Handeslip* admitted in fee, in remainder, after
24th April, 1695. } the death of the said *Phillis Handeslip*, under the said will, to the same premises.

“ ‘*Et fecit finem.*’

“ ‘B. 6. P. 39. } *Hammond Eagle* admitted for life, under the will of
4th Oct. 1734. } *Edward Eagle*, to 32 acres of fen land.

“ ‘And he paid his fine.

“ ‘B. 6. P. 109. } *Edward Eagle* admitted in fee, after the death of
6th May, 1740. } said *Hammond Eagle*, to the remainder under the same will, to 8 acres (part of said 32 acres).

“ ‘And he paid his fine.’

“ ‘B. 9. P. 219. } *Elizabeth Payne*, for life, under the will of *Thomas*
25th May, 1740. } *Payne*, her husband, to a messuage and barn, and 18a. 1r. 20p. of arable land.

“ ‘And she paid her fine.

“ ‘Same Court. } Said *Thomas Payne*, the son, admitted in remainder
} expectant on the decease of said *Elizabeth Payne*.

“ ‘And he paid his fine.’

“ ‘B. 3. P. 30. } *Agatha Last* admitted on the surrender of *John*
20th April, 1632. } *Last*, to the reversion, when it shall happen, after the death of *Alicid Morley*, of 3 roods of land in *Short Bryan*; and the reversion of 30 acres of arable land, late *Lincoln's*; and the reversion of 30 acres of arable land, late *Baker's*.

“ ‘*Et sec. sepal. fin. et de sepal. rev. con. fide.*’

“ ‘B. 5. P. 47. } *John Lamming* and *Mary Roper*, his intended wife,
20th May, 1717. } admitted, on the surrender of said *John Lamming*, to 14 acres of marsh, rent —, and to 8 acres of marsh in *Stallode*, and half an acre of marsh in *New Fen*, To hold to said *John Lamming* and his heirs until the solemnization of said intended marriage, with remainder to them for their natural lives and the life of the longest liver of them, with remainder to the right heirs of the said *John Lamming*.

“ ‘*Et fecer. sepal. fin.*’

" 'B. 5. P. 17. } *Thomas Hinson* and *Ann* his wife admitted, for their
23rd April, 1711. } lives, and the life of the longer liver of them, with
remainder to *Thomas Hinson*, son of said *Thomas*
and *Ann*, his heirs, &c.

" ' *Et fecer. fin., et admissi sunt, &c.* '

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" And the following extracts from the Court Rolls were
read in evidence on the part of the defendant:—

" 'Lib. 1. P. 2. } *John Outlaw* and *Margaret* his wife surrender To
Ann. 1626. } the use of *Nicholas Outlaw* and *Helen* his wife, for
their lives, and the life of the survivor, and, after
the decease of the survivor, To the use of *Thomas*
Morris, his heirs and assigns.

' *Nicholas Outlaw* and *Helen* his wife thereupon ad-
mitted for life, and *Thomas Morris* to the remainder
in fee.

" ' *Et dant dm. de fine.* '

" 'Lib. 1. P. 14. } *Richard Whistler*, senior, and *Alice*, his wife, ad-
Ann. 1633. } mitted for life, and *Richard Whistler*, junior, and
Bridget, his wife, to the remainder in fee.

" ' *Et admissi sunt inde tenentes, et fecerunt*
inde dmo. finem. '

" 'Lib. 1. P. 31. } *Elizabeth Spicer* admitted for life, *William Spicer* to
Ann. 1641. } the remainder in fee.

" ' *Et admissi sunt inde tenentes, et fecerunt*
dmo. finem. '

" 'Lib. 2. P. 11. } *Mary Fuller* admitted for life, *John Furnan* to the
Ann. 1662. } remainder in fee.

" ' *Et admissi sunt ind. tenen., et fec. finem.* '

" 'Lib. 2. P. 41. } *Phillis Hanslip*, under will of *William Hanslip*, ad-
Ann. 1671. } mitted for life, *William Hanslip* the son to the re-
mainder in fee.

" ' *Et admissi sunt inde tenen., et fec. finem.* '

" 'Lib. 2. P. 42. } *Mary Morley* admitted for life, *Edmund Morley* to
Ann. 1672. } the remainder in fee.

" ' *Et admissi sunt inde tenen., et fecerunt*
finem. '

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“ ‘ Lib. 5. P. 4. } Robert Seeker and Maria Seeker admitted for life,
Ann. 1709. } and Jane Seeker to remainder in fee.

“ ‘ *Et admissi sunt inde tenentes, et fecer. fin.*’

“ ‘ Lib. 9. P. 15. } Elizabeth Gathercole admitted, under the will of
Ann. 1790. } John Gathercole, for life, Ann Gathercole to remain-
der in fee. “ ‘ And they paid their fine.’

“ ‘ Lib. 4. P. 74. } William Fuller admitted, on surrender of Samuel
Ann. 1702. } Hall, to 8 acres of fen or marsh ground, To use of
said William Fuller and his assigns during the term
of his natural life, and, from and after his decease,
To the use of Thomas Fuller, his son.

“ ‘ *Et fec. fin.*

“ ‘ Lib. 6. P. 82. } Presented that the last-named Thomas Fuller died
Ann. 1738. } seised of said premises, and that Thomas Fuller was
his eldest son and next heir, who was thereupon ad-
mitted, and paid his fine.’

“ ‘ 14th Oct. 1818. John Caldecott admitted under the will of the Rev.
John Barnes, To hold unto the said John Cal-
decott and his assigns for and during his life, with
remainder as in the said will is mentioned.

“ ‘ And he paid his fine.’

“ It was agreed that the Court should be at liberty to draw any conclusion of fact as to the existence or non-existence of any special custom within the manor, and of the extent of such special custom, as they might think the jury ought to have drawn.

“ Part of the premises to which the father of the defendant and the defendant were so admitted consists of fen lands within the operation of the statute 8 Geo. 3, c. 47, intituled ‘ An act for draining and preserving certain fen lands and low grounds in the parishes of *Lakenheath* and *Brandon*, in the county of *Suffolk*;’ and also of certain acts passed in the 35th, 36th, 45th, 56th, and 58th years of the reign of Geo. 3, and in the 2 Geo. 4, for (amongst other things) improving the drainage of *Bedford Level*; which

acts authorized the collection of certain drainage taxes. The particular clauses considered to bear upon the points submitted for the opinion of the Court were set forth in the case; but the acts were agreed to be made a part of the case; and any other clauses considered to bear upon the points, the counsel to be allowed to refer to.

“Under the above-mentioned acts, the drainage taxes thereby imposed, amounting together to four shillings *per* acre, were annually assessed upon the said part of the above-mentioned premises so subject to their operation as aforesaid (a).

“The several fines conceived to be due and payable by the defendant upon his admission to the said premises, were assessed by the steward of the manor, after deducting all quit rents payable in respect thereof, at certain sums of money amounting in the whole to the sum of 227*l.* 18*s.* 4*d.*

“If the plaintiffs were entitled, upon the admission of the defendant, under the circumstances thereafter set forth, to a full fine, and that without making any deduction for the drainage and *Eau Brink* taxes, then they would be entitled to recover 182*l.* If they were entitled to a full fine after deducting the drainage and *Eau Brink* taxes, as well as quit rents, they would be entitled to recover 160*l.* If they were not entitled to a full fine, the defendant would be entitled to a verdict.”

Mr. Serjeant *Storks*, for the plaintiffs.—A special custom for the lord to take a full fine upon the admission of a remainder-man, after the death of the tenant for life, is good—*Doe d. Whitbread v. Jenny* (b): and here the evi-

(a) The question arising upon the statutes authorizing the levying of these fen taxes was argued at considerable length, but the Court in their judgment abstained

from making any remarks upon them: the argument is therefore omitted.

(b) 5 East, 522; *S. C.* 2 Smith, 116. 1 Bac. Abr. 735.

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dence was ample to support such a custom. Where both tenant for life and remainder-man pay a fine, in the absence of proof to the contrary, the inference of law is that such fine is in both instances a full fine; and one instance is sufficient to establish the custom—*Doe d. Mason v. Mason* (a), *Roe d. Bennett v. Jeffery* (b). In the absence of any special custom, the admission of the tenant for life is the admission of the remainder-man (c). But here a special custom is established; and the fine is not due till after admittance—*Graham v. Sime* (d). The extracts from the court-rolls of the manor, which are set out in the case, exhibit many instances of the admittance of remainder-men, and the payment by them of fines; and although the amount of the fines paid on those occasions is not stated, it must be inferred that they were full fines, viz. the same as those paid on admission of the tenant for life.

Mr. Serjeant *Wilde, contra*.—The lord is in all cases entitled to know who his tenant is, and for this purpose may compel him to come in and be admitted; but the effect of the admittance, and the amount of the fine, depend upon the special customs of each particular manor—*Coke's Complete Copyholder*, 194. *Nelson's Lex Maneriorum*, 20. Customs that are in favour of the copyholder are liberally construed; but those in his restraint, and in favour of the lord, are to be construed strictly—1 *Watkins on Copyholds*, 60. The claim in the present case, for a full fine on the admission of the remainder-man, the tenant for life having already paid his full fine, is not sanctioned by the general law of copyholds—1 *Cruise*, 312, par. 10, 13—the fine usually payable in such case is only a half fine—1 *Watkins on Copyholds*, 481:

(a) 3 Wils. 63.

(b) 2 Mau. & Selw. 92.

(c) *Tipping v. Bunning*, Moore,

465. 3 Lev. 408. *Gilbert's Tenures*, 219, 418, 419.

(d) 1 East, 613.

and the lord may apportion the fine, the remainder-man paying his share when he comes into possession—*Blackburne v. Graves* (a), *Tipping v. Bunning* (b), *Brown's case* (c), *Barnes v. Corke* (d). The custom here set up is not to be made out by mere equivocal entries on the court-rolls of the manor, in the absence of all reputation of any such custom. There is no instance of a full fine being paid by a remainder-man; for all that appears, the fines alleged in the various entries to have been paid by the remainder-men, were only the apportioned fines.

Mr. Serjeant *Storks*, in reply, commented upon the several entries set out in the case. He relied principally upon *Payne's case*, and *Lamming* and *Roper's case*.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court:—

In this case, which was argued before us in the last term, the facts were as follow:—The plaintiffs were lords of the manor of *Lakenheath*, in the county of *Suffolk*, and the premises in respect of which the question arose were copyhold, and holden of that manor. By the will of the Reverend *John Barnes*, the premises were devised to the father of the defendant, as tenant for life, with remainder to the defendant in fee; and, on the death of Mr. *Barnes*, the defendant's father was duly admitted as tenant for life, "with remainder as in the said will is mentioned;" and on that occasion he paid a full fine of two years' improved value, the fines being, according to the custom of that manor, arbitrary. On the death of his father, the defen-

(a) 1 Vent. 260. 1 Mod. 120.

3 Keb. 263.

(b) Moore, 465.

(c) 4 Rep. 21.

(d) 3 Levinz, 308.

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dant was admitted as tenant in fee to the same premises, and the plaintiffs claimed another full fine on that occasion.

Upon the trial, it appeared that all the evidence applicable to this subject was of a documentary nature, and it was therefore agreed by both parties to state that evidence for the opinion of this Court, in the form of a special case; referring it to the Court to find such conclusions of fact as they might think the jury, properly directed, ought to have found at the trial, and thereupon to give such judgment as in point of law ought to follow.

We have duly considered the above facts submitted to us, and have arrived at the conclusion that the verdict should be entered for the defendant.

It is conceded, on the part of the plaintiffs, that, unless they are entitled to claim a full fine on the admittance of the defendant, they cannot succeed. The question therefore is, whether they have affirmatively established that point. In order to do this, it is necessary that they should shew a special custom for that purpose. That this is the law, is clear from several authorities. In *Barnes v. Corke* (a), it is laid down, on argument, by the two Judges in Court, "that no fine was due on the admittance of a remainder-man, after admittance and payment of a fine by the tenant for life, unless there be a special custom for it; but that the admittance to the particular estate was an admittance to the remainder: and that which is said in 4 Rep. 22 b, that it shall not be to the prejudice of the lord in respect of his fine, is to be intended where a fine is due by custom for an admittance of the remainder-man; but, without a special custom, none is due." And for this position various authorities are there cited. Indeed, on referring to the report (b), it appears to have been so laid down in terms by Lord Coke; for, he says that "the admittance of the

(a) 3 Levinz, 308.

(b) 4 Rep. 22 b.

tenant for life is the admittance of him in remainder, to vest the estate in him, but shall not bar the lord of his fine which he ought to have by the custom (a)." And he puts the tenant in remainder in such a case upon the same footing as the heir, who, though he is in by the admittance of his ancestor, may nevertheless be compelled to come in and be admitted, in order that the lord may have his fine due by the custom of the manor upon the descent. It should seem, therefore, that Lord *Coke* himself puts it on the custom. But, in *Blackburne v. Graves* (b), it is very distinctly laid down by Lord *Hale*, who, after stating that he did not see "any inconvenience why the admittance of tenant for life or years should not be the admittance of all in remainder; for fines are to be paid notwithstanding by the particular remainders"—adds afterwards—"It shall not prejudice the lord; for, if a fine be assessed for the whole estate, there is an end of the business; but, if a fine be assessed only for a particular estate, the lord ought to have another."

The law, as thus laid down by Lord *Hale*, appears to us to explain and reconcile all the *dicta* on the subject, by distinguishing between those where the Judges, in speaking of a *fine*, must be understood as meaning a full fine, and others, where, in using the same expression, they only mean an apportioned part of the full fine. It explains, also, with the exception of one, all the instances of admittances which are to be found in the statement of this case.

The first four instances, of *Malt*, *Taylor*, *Newton*, and *Roper*, are quite consistent with the idea that, in those cases, the tenants for life, on their admittance, paid a fine only for their particular estates, and the tenants in remainder another on their subsequent accession to the tenancy, and admittance. The same observation applies to the

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(a) See also 4 Rep. 23 a.

(b) 1 Mod. 120.

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cases of *Holmes*, *Harding*, *Tunnell*, and *Eagle*: On the other hand, in the cases relied on by the defendant, of *Outlaw*, *Whistler*, *Spicer*, *Fuller*, *Morley*, *Secker*, and *Gathercole*, where both the tenants for life and in remainder are admitted at the same time, and pay their fine, it is not at all improbable that the fines were there assessed for the whole estate, and that there was in those cases, as Lord *Hale* expresses it, "an end of the business;" for, we find in the manor books no further admittance of the tenants in remainder in those cases. The case of *Hanslip* is probably inaccurate in some respects. It appears that, although in 1671, *John Hanslip*, the son, was actually admitted to the remainder in fee at the same time that his mother was admitted for life, yet he was afterwards admitted a second time, in 1695, upon her death, and paid a fine. Probably, however, this was really the case of an apportionment of the full fine in 1671, between the tenant for life and the tenant in remainder, and the part of the fine due from the tenant in remainder not having been then paid by him, he was in 1695 called upon to be admitted, in order that his apportioned fine might be paid to the lord.

These cases being thus disposed of, there remain only two instances to be considered—that of *Payne*, in 1807, and *Willett*, in 1821. The former is inapplicable to the present question; for, the special custom (if any) which it is calculated to establish, is not the one now relied on by the plaintiffs. And as to the case of *Willett*, although it is an instance expressly in point, yet it is much too recent, even if unopposed by other instances, to be the foundation of a claim like the present on the part of the plaintiffs. But we also think that it is very difficult to reconcile this instance with the case of *Fuller*, adduced on behalf of the defendant. There, *William Fuller*, in 1702, is admitted, on a surrender by *Hall*, to eighteen acres of fen, to the use of the said *William Fuller*, and his assigns, for life, and, after his

death, to the use of *Thomas Fuller*, his son, in fee. Now, *Thomas Fuller*, the son, does not appear ever to have been admitted or paid any further fine to the lord; for, the next admittance to be found on the books is in 1730, being that of *Thomas Fuller*, the grandson of *William Fuller*, as heir to his father, *Thomas Fuller*, who died seised of the premises. It appears, therefore, that *Thomas Fuller*, the father, was considered as admitted under the original admittance in 1702, for there is no trace of any other admittance of him, or of any fine subsequently paid by him.

Upon the whole, therefore, we are of opinion, that, if these different instances had been brought before a jury, and properly commented on by the Judge at *Nisi Prius*, they ought by their verdict to have found that no special custom for taking one full fine on the admittance of tenant for life, and another full fine on the admittance of the tenant in remainder, was affirmatively proved on the part of the plaintiffs. And, as the law appears to be clear (and, indeed, was admitted so to be on the argument of this case), that, without such special custom, no such fine would be claimable, we are of opinion that the verdict ought to be for the defendant.

The present decision of the Court on this point makes it unnecessary to give any opinion on the other point made in the course of the argument, as to the drainage tax.

Postea to the defendant (a).

(a) See *Comyns's Digest*, title *d. Boer v. Trueman*, 1 Barn. & "Copyhold," (H.1). And see *Doe* Adolph. 736.

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Friday,
May 11th.

CRISP v. Sir HENRY EDWARD BUNBURY, Bart., H. S.
WADDINGTON, and S. MURE.

Since the statute 9 Geo. 4, c. 92, an action at law is not maintainable by a depositor against the trustees of a Savings' Bank: the only mode of adjusting disputes is by reference, as pointed out by the 45th section of that act.

THIS was an action of *assumpsit* tried before Lord Chief Justice Tindal at the Sittings at Westminster, after Michaelmas Term, 1830, when a verdict was found for the plaintiff for 44*l.*, subject to the opinion of the Court upon the following case:—

“ The declaration described the defendants as trustees of the *Mildenhall* Bank for savings, and contained the money counts and a count for interest. The defendants pleaded the general issue.

“ In April, 1818, a Savings' Bank was established at *Mildenhall*, in the county of *Suffolk*, under the provisions of the act of 57 Geo. 3, c. 130. Several rules were then established, which were duly enrolled with the clerk of the peace, and afterwards acted upon (a).

(a) The rules and regulations of the institution which applied to the case were as follow:—

1. The affairs of the Bank shall be conducted by not less than six trustees, twenty managers, and a treasurer, none of whom shall derive any benefit from the deposits, or receive any remuneration for services. Every trustee will be considered as an honorary manager. General meetings shall be held on the first Friday in October, January, April, and July, to receive the reports, and to examine and audit all accounts of the establishment. The managers shall also have the power of filling up vacancies, and of adding to the

number of trustees and of their own body. Upon the requisition of three managers, a special meeting may be called, upon giving four days' previous notice. At every general meeting, one trustee and four managers shall be competent to act.

2. A clerk shall be appointed on the first Friday in October in every year by the trustees and managers of the institution. It shall be his duty to attend the general meetings of the managers, to enter their proceedings in a book, and to call any special meetings. He shall also attend at the office from four o'clock till seven every Saturday evening, and

“ The defendants with others since dead were duly appointed trustees, and acted as such. *William Newton*, Esq., also was and acted as a trustee, and is still living, though *not made a defendant*. *Mr. W. Bassett* was and acted as one of the managers, who, as well as the plaintiff, was resident in the parish of *Brandon*. *Sir Henry Edward Bunbury*, one of the defendants, did not live there,

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from twelve till two o'clock every *Monday*, for the purpose of receiving deposits, entering the same at the time in the cash account book, and making corresponding entries in the receipt books given to each depositor. The managers shall grant such a salary to the clerk as shall in their judgment appear no more than an adequate compensation for the labours of his office. In case of misconduct, the clerk may be suspended by order of one trustee and two managers, and may be dismissed and a successor be appointed by a special meeting of the managers, which shall be always called in case of the suspension of the clerk. One manager shall attend at the clerk's office every *Monday*, to superintend the current business of the institution, to sign the general account book, and to enter such observations as may occur to him in the report book. The treasurer shall receive the deposits from the clerk every *Monday*, and whenever they shall from time to time amount to 50*l.*, the treasurer shall invest the same according to the provisions of the act of the 57 Geo. 3, c. 130.

3. The clerk shall give security

in the sum of 100*l.*, that is to say, himself in 50*l.*, and two sureties in 25*l.* each.

4. In every parish where a trustee or manager of this institution shall be resident, he shall be empowered to receive the deposits of persons living in such parish, and to remit them every *Monday* to the clerk, the manager signing the book of the depositor from whom he receives the money.

13. The managers shall be at liberty to return the amount of the deposits of any depositor, on giving one month's notice, and likewise to refuse any deposits which may be offered.

17. *Any matter in dispute between this institution and any person acting under the same, and any depositor therein, or any executor, administrator, or next of kin of any deceased depositor, or any person claiming to be such executor, administrator, or next of kin, shall be referred to the arbitration of two persons, one to be named by the managers, and the other by the claimant; and in case the two persons so named shall not agree, they shall forthwith nominate an umpire, and the decision and award of such referees and umpire shall be final and binding upon both parties.*

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but at *Mildenhall*. A treasurer was duly appointed, and acted.

“ One *William Gill* was duly appointed clerk in the year 1818, and continued to act in that capacity until 1825, when it was discovered that he had embezzled a considerable sum of money, the amount of deposits which had been received by him. He absconded, and was ultimately prosecuted by the trustees to conviction, and sentenced to transportation. The said *Mr. Bassett* from time to time received deposits of the plaintiff and duly signed his book, in which such deposits were regularly entered, but he never saw *Crisp's* account in the possession of the clerk, or attended at the clerk's office after *March*, 1819, the clerk having told him that he would give him notice when it was necessary for him to attend. On *Gill's* absconding, *Mr. Bassett* went to *Gill's* house, and there found two cash account books, one a false and the other a true one, in each of which the plaintiff's account with the Bank was entered, from which it appears, that, between *July* 1819, and *May*, 1821, deposits to the amount of 64*l.* 15*s.* were made by the plaintiff and came to the hands of the clerk, of which, in and previous to *October*, 1823, the plaintiff had withdrawn and received various sums amounting to 55*l.* 17*s.* 2*d.*, but, calculating interest from time to time on the balance in the hands of the clerk, the plaintiff's claim, in *December*, 1823, was 34*l.* 14*s.* 6½*d.*, and in *June*, 1824, was 35*l.* 8*s.* 3½*d.*

“ The copy of the plaintiff's account in both books was precisely similar, except that in the false book the word ‘paid’ was added at the end of the account, importing that the whole balance had been paid to the depositor.

“ That such receipts and payments on account of deposits were made by the clerk as appears by the above account, is admitted on both sides; as also that the plaintiff has not received the balance of the account.

“ A letter was, on the 27th *June*, 1829, written by the

plaintiff's attorney directed to the defendants and the said *William Newton* and various other gentlemen, wherein, after alluding to the embezzlement and conviction of the clerk, and expressing a hope that an amicable adjustment of the claims of the several depositors might be effected, he expressed himself as follows:—

“ ‘ In order that any investigation of the accounts that you may desire may be properly entered into, we beg to inform you that *Amos Crisp* (the plaintiff), one of the depositors, whose loss and consequent demand on you amounts to the sum of 34*l.* 14*s.* 6*d.*, or thereabouts, with interest thereon, has, under the rules and regulations of the institution, appointed *Charles Austin*, Esq., to be his referee, and we hereby, on the part of the said *Amos Crisp*, request you will, within one month from the date hereof, appoint a referee on your behalf, and inform us of the name and description of the person so appointed, that the reference, if necessary, may be immediately proceeded with; and beg you will consider this as a notice to that effect, and that the said referee appointed by the said *Amos Crisp*, when he enters into the case of the said *Amos Crisp*, will also be prepared to enter into and investigate the cases of all the other depositors having claims on you, and to enter into and adjust all accounts and matters in dispute between you and the said depositors.’

“ A copy of this letter was about the time of its date sent by the General Post, addressed to each of the persons above mentioned, but Sir *Henry Bunbury* was then abroad, and did not return to *England* till after this action was brought. No arbitrator has ever been named by the managers or trustees, they altogether denying their liability, and it being admitted that they have no funds in hand to satisfy the plaintiff's claim.

“ It is admitted that general meetings, to receive the reports, and to examine and audit all the accounts of the establishment, were not held pursuant to the first rule

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of the institution. About the time *Gill* absconded, the plaintiff went to his house for the purpose of making a formal demand; but he found the premises shut up, and that *Gill* had absconded."

The question for the opinion of the Court was, whether the plaintiff was entitled to recover against the defendants in this action the balance of his said account, and interest, amounting altogether to 44*l.*, or any and what other less amount; if so, the verdict to be entered for the plaintiff accordingly; if not, a verdict to be entered for the defendants.

The case now came on for argument. The objections urged on the part of the defendants to the plaintiff's right to maintain the action were—*first*, that *William Newton*, the trustee mentioned in the case, ought to have been joined in the action—*secondly*, that the managers only were liable, and not the trustees, who were mere honorary members—*thirdly*, that, as against the managers, the only remedy of the plaintiff was by arbitration, as directed by the 9 *Geo.* 4, c. 92, s. 45 (a).—*fourthly*, that money had and received would not lie against the trustees or managers except for money actually coming to their hands.

Mr. Serjeant *Storks*, for the plaintiff.—As to the first objection, he cited *Mitchell v. Tarbutt* (b), where to an ac-

(a) Which enacts "That, in case any dispute shall arise between any such institution, or any person or persons acting under them, and any individual depositor therein, the matter so in dispute shall be referred to the arbitration of two indifferent persons to be chosen and appointed in the manner therein pointed out: and, in case of their not agreeing, then

to the barrister at law to be appointed by the commissioners, as directed by the act; and whatever award shall be made by the said arbitrators, or the said barrister, shall be binding and conclusive on all parties, and shall be final to all intents and purposes without any appeal."

(b) 5 Term Rep. 649.

tion on the case against several partners for negligence in their servant, whereby the plaintiff's goods were lost, it was held that it could not be pleaded in abatement that there were other partners not named—as to the second, he submitted that, as, by the rules of the institution, the clerk was to be appointed by the *trustees* and managers, both were responsible for his default: and he cited *Sadler v. Evans* (a)—as to the third, that the plaintiff had done all that was incumbent on him, by naming an arbitrator on his part; that the statute 9 Geo. 4, c. 92, which repealed the 57 Geo. 3, c. 130, did not apply to disputes arising before the passing of that act; and that the words of the 92nd section were directory only, and were not intended to oust the jurisdiction of the Courts at *Westminster*: and he referred to *Cates v. Knight* (b), and *The King v. Wade* (c)—and as to the fourth objection, he cited *Eaton v. Bell* (d).

Mr. Serjeant *Taddy*, *contra*.—If the action be maintainable at all, it must be against all the trustees and managers jointly. In *Jackson v. Pearson* (e) it was held that an action under the 9 Geo. 1, c. 22, s. 7, which requires the inhabitants of the hundred to make satisfaction for damages occasioned by the acts therein mentioned, must be against all the inhabitants of the hundred; and the declaration being against two only it was held bad, on motion in arrest of judgment. Mr. Justice *Holroyd* there said (f): “The statute gives an action, not against individuals, but against a class of persons constituting a fleet-
ing body, who, for the purpose of defending suits, are to be considered in the nature of a corporate body. Here, the action is brought against the defendants as individuals; and, if well brought, the judgment may operate against

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(a) 4 Burr. 1984.

(b) 3 Term Rep. 442.

(c) 1 Barn. & Adolph. 861.

(d) 5 Barn. & Ald. 34.

(e) 1 Barn. & Cress. 304; S. C.

2 Dowl. & Ryl. 439.

(f) 1 Barn. & Cress. 307.

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them as individuals. They and their personal representatives will be liable upon the judgment." So, here, the property of the depositors is vested in all the trustees and managers, and they may sue and defend as a corporate body. The general rules as to pleading in abatement cannot apply here, as the trustees and managers are not partners or co-contractors. If the plaintiff might select one or more of the trustees to make defendants in an action, he might sue one who has no power over the funds of the institution when the action is brought. At all events, the *trustees* have no power over the funds; the *managers* alone have the disposition of the deposits. The clerk is the servant, not of the trustees and managers only, but of the institution, including of course the depositors.

The provisions of the statute 9 *Geo.* 4, c. 92, extend (s. 72) "to all Savings' Banks *established*, and thereafter to be established, in *England* and *Ireland*." That statute was the only one in force at the time this action was commenced. The 45th section points out a mode of adjusting disputes that may arise between the institution and any of the depositors; it erects a domestic *forum*, to the exclusion of the jurisdiction of the courts at *Westminster*.

Mr. Serjeant *Storks*, in reply.—The statute gives no remedy against any party in an official character, therefore the trustees and managers are individually responsible for acts of negligence or misconduct in themselves or their servants. The statute 9 *Geo.* 4, c. 92, does not repeal the 57 *Geo.* 3, c. 130, as to previous transactions. The authority of the Courts at *Westminster* is not to be taken away except by express words.

Lord Chief Justice TINDAL now delivered the judgment of the Court:—

This is an action of *assumpsit* against the defendants

as trustees of the *Mildenhall Bank* for savings, and is brought for money had and received by them to the use of the plaintiff. This bank was established in the year 1818, under the rules and regulations set out in the case; and, from that time until the passing of the statute of 9 Geo. 4, c. 92, was governed by the various provisions contained in the statute 57 Geo. 3, c. 130. But the statute, with certain other acts which had been passed for amending it, was repealed by the 9 Geo. 4, c. 92, with an exception that nothing in that act contained should invalidate or annul any payments, agreements, or appointments made, or any instruments executed under the authority of any of the repealed acts; and, by the last section of the 9 Geo. 4, that statute is declared to extend "to all Savings' Banks established, and thereafter to be established in *England* and *Ireland* (a)." It appears, therefore, to us that the only law which governed and regulated the rights of the parties to this action, at the time the action was brought, is to be derived from the only statute then in existence in relation to the subject-matter of the action, *viz.* the 9 Geo. 4, c. 92.

Amongst the objections that have been urged by the defendants against the right to maintain this action, one is, that, by the 45th section of the last statute, the legislature has provided, "that, in case any dispute shall arise between any such institution, or any person or persons acting under them, and any individual depositor therein, the matter so in dispute *shall* be referred to the arbitration of two indifferent persons, to be chosen and appointed in the manner therein pointed out; and, in case of their not agreeing, then to the barrister-at-law to be appointed by the commissioners as directed by the act, and whatever award shall be made by the said arbitrators or the

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(a) The fact was (though it did not appear in the case), that the *Mildenhall Savings' Bank* had

ceased to exist before the passing of the 9 Geo. 4, c. 92.

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said barrister, shall be binding and conclusive on all parties, and shall be final to all intents and purposes, without any appeal." And it is contended, on the part of the defendants, that this enactment is imperative upon the plaintiff, taking away the jurisdiction of the Courts of common law, and leaving the party who complains no other mode of determining his claim than that which is pointed out and provided by the act.

It is not denied, on the part of the plaintiff, that the present case falls within the description of those contained in the 45th section; indeed, it would be impossible to argue that the present is not a dispute between persons acting under the institution and an individual depositor; but it is contended by the plaintiff, that the jurisdiction of the Courts of common law is not ousted by any words to be found in this section, and that the utmost which the section contemplates is, to create a concurrent, not an exclusive, jurisdiction in the arbitrators or barrister.

But we are of opinion, that, both with reference to the words of the statute, and the object which it had in view, the plaintiff is barred from maintaining the present action in a Court of law, and must pursue the remedy provided by the statute.

It is undoubtedly true that the jurisdiction of the superior Courts of *Westminster* is not to be ousted except by express words, or by necessary implication—*Cates v. Knight* (a); yet, where the object and intent of the statute manifestly require it, words that appear to be *permissive* only, shall be construed as obligatory, and shall have the effect of ousting the Courts of their jurisdiction, as in the case last referred to, where a clause enacted that it "*shall and may be lawful*" for a Justice of the Peace to hear and determine offences against the act that subject the offender to penalties not amounting to 50*l.*, with a power to

the Justice to mitigate the penalties; whilst the same directed that all penalties which amounted to 50*l.* or more "*shall* be sued for in his Majesty's Courts at *Westminster*"—it was held, that, by necessary implication, the Courts above were ousted out of their jurisdiction in the case of penalties not amounting to 50*l.* Now, in this case, the legislature has enacted that disputes of the description of the present "*shall* be referred"—words which in their natural force denote an obligation, not a permission only; and, unless these words are construed to be compulsory on the plaintiff, they mean nothing. If they are not compulsory on the plaintiff, neither can they be so, upon any principle of fair construction, upon the defendants. And, if the recourse to arbitration is not intended, except both parties choose to adopt it, then indeed the act is made in this respect a dead letter; for, it would be competent for both parties to refer the dispute to arbitration, if they both agreed upon it, without the intervention of the statute.

In order, therefore, to give these words of the statute any force or operation, the word *shall* must be construed as obligatory, that is, that the matter in dispute shall of necessity be referred to arbitration, and not determined in any of the Courts of *Westminster-Hall*. But, looking at the object and intention of the legislature, we think it clear that the remedy by action is taken away, and that by arbitration substituted in its place. These institutions were intended to comprehend a very large number of depositors, chiefly from the lower walks of life; many of them contributing very small sums, and claiming very small profits by the addition of interest: on the other hand, the trustees and managers are uncertain in point of number. To allow, therefore, actions at law to be maintainable by each depositor against the trustees upon the occasion of every dispute with the institution, either as to the amount of the balance due, or the interest claimed by him, would be in effect to cause the ruin both of the depositors and of

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the institution, by casting the costs of an action in the superior Courts at *Westminster* upon the losing party. No person would fill the gratuitous office of a trustee or a manager if he were exposed to the hazard of suits at law at once so expensive and so numerous: no depositor would be able to enforce his just rights, if he must sue in the superior Courts, at the hazard of being defeated, with heavy costs, if he sued more of the trustees than he might be able to prove liable; or subject to have his suit abated if he sued too few. It is evident, therefore, that the legislature contemplated the cheap, simple, speedy, and equitable adjustment of all disputes, by a reference, in the mode pointed out in the act, instead of a more expensive, dilatory, and uncertain remedy by action at law. And we think we should defeat that very serviceable object—serviceable alike to the depositors and to the institution—unless we construed the words used as words which import an obligation to refer, and which take away the right to sue in the superior Courts.

In this view of the case, it would be improper to give any opinion on the other points which were made in argument, as we have no jurisdiction; and we can only express our surprise and regret that the defendants, who set up this as a ground of defence, did not act upon it when the plaintiff appointed an arbitrator on his part. At present, however, there must be judgment for the defendants.

Judgment for the defendants.

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KINGSFORD v. MARSHALL.

Saturday,
May 12th.

THIS was an action on a policy of insurance on wheat, on board the *Lady Anne*, at and from *London* to *Dunkirk*. The policy contained the usual memorandum by which corn, &c., were warranted free from average, unless general, or the ship stranded. The action was brought for an average loss upon the wheat by reason of the stranding of the vessel in the harbour of *Dunkirk*.

The cause was tried before Lord Chief Justice *Tindal*, at the Sittings in *London* after the last *Michaelmas* Term. The question was, whether or not there was a stranding of the ship within the meaning of the policy. The facts which appeared in evidence were as follow:—The harbour of *Dunkirk* is a tide-harbour, that is, is left dry at low water, with the exception of a narrow channel along which a stream of fresh water flows from the land. The *Lady Anne* arrived in the harbour about the time of high water, and was, by order of the harbour master, moored fore and aft to the quay, in a place pointed out by him, with a running tackle from the main-mast-head to the quay, for the purpose of preventing the ship from heeling over on the receding of the tide. At the ebbing of the tide, the rope affixed to the mast-head broke, and the ship fell over on her side, striking against some hard substance which perforated her bottom in the second and third planks from the keel, by means whereof the cargo was damaged. The evidence was contradictory as to whether or not the ship took the ground precisely at the time and in the manner and place in which it was intended she should do so.

His Lordship told the jury, that, if the ship took the ground merely in consequence of the ebbing of the tide,

A policy of insurance on wheat from *London* to *Dunkirk* contained the usual memorandum by which corn, &c., were warranted free from average, unless general, or the ship were stranded. On the ship's arrival at *Dunkirk*, the harbour of which is a tide-harbour, she was, by the direction of the harbour master, moored fore and aft to the quay in a particular spot, with a running tackle from her mast-head affixed to a post on the shore, to prevent her falling over on the ebbing of the tide. The rope of the running tackle breaking, the vessel fell on her side, and was injured by coming in contact with some hard substance in the bed of the harbour, and the cargo damaged. It appeared, however, that the vessel fell precisely in the spot in which she was intended

ed to settle:—*Held*, that this was not a stranding within the meaning of the policy.

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and at the very place where it was intended she should, at the time she was moored, then there was no stranding within the meaning of the policy: but that, if, in consequence of the breaking of the rope, or any other casualty, the ship took the ground, not in the place where it was intended she should settle by the ebbing of the tide, but in some other and different place, then there was a stranding.

The jury returned a verdict for the defendant.

Mr. Serjeant *Taddy*, in the last term, obtained a rule *nisi* that this verdict might be set aside and a new trial had, on the ground of misdirection.—He referred to the following cases—*Carruthers v. Sydebotham* (a), where a ship, being under conduct of a pilot, in her course up the river to *Liverpool*, was, against the advice of the master, fastened at the pier of the dock basin, by a rope to the shore, and left there, and took the ground, and, when the tide left her, fell over on her side and bilged, in consequence of which, when the tide rose, she filled with water, and the cargo was wetted and damaged: it was held that this was a stranding to entitle the assured to recover for an average loss upon the cargo—*Fletcher v. Inglis* (b), where a transport in government service was insured for twelve months, during which period she was ordered into a dry harbour, the bed of which was hard and uneven, and, on the tide having left her, she received damage by taking the ground: it was held that this was a loss by a peril of the sea—and *Rayner v. Godmond* (c), where, during the course of a voyage upon an inland navigation, it became necessary, in order to repair the navigation, to draw off the water; and the ship, in consequence, having been placed in the most secure situation that could be found, when the

(a) 4 Mau. & Selw. 77.

(b) 2 Barn. & Ald. 315.

(c) 5 Barn. & Ald. 225.

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water was drawn off, went by accident upon some piles, which were not previously known to be there: and it was held that this was a stranding within the usual memorandum in the policy, *the accident having happened not in the ordinary course of such voyage (a).*

[Mr. Justice Alderson referred to *Wells v. Hopwood (b)*. There, a ship having on board goods which were insured on a voyage from *London to Hull*, but "warranted free from average, unless general, or the ship should be stranded," arrived in *Hull* harbour, which is a tide-harbour, and proceeded to discharge her cargo at a quay on the side of it: this could be done at high water only, and could not be completed in one tide. At the first low tide, the vessel grounded on the mud, but, on a subsequent ebb, the rope by which her head was moored to the opposite side of the harbour stretched, and the wind blowing from the east at the same time, she did not ground entirely on the mud, which it was intended she should do, but her forepart got on a bank of stones, rubbish, and sand near to the quay;

(a) In *Hearne v. Edmunds*, 4 J. B. Moore, 15; S. C. 1 Brod. & Bing. 388, a vessel with a cargo on board took the ground on two successive days in going up *Cork* harbour under the direction of a pilot, and, being afterwards moored in the usual course, was thrown on her broadside by the receding of the tide, and received considerable injury: it was held that this was not a stranding within the meaning of that term in the memorandum at the foot of the policy. With reference to this case, Lord Chief Justice Abbott, in the case last cited in the text, says (5 Barn. & Ald. 227): "The case of *Hearne v. Edmunds* has relieved my mind from the only remaining difficulty which I felt in this case, which

was, lest it should follow, from our decision, or from that of *Carruthers v. Sydebotham*, that every settling on the ground by a vessel should be deemed a stranding; but that case was decided on a distinction which leaves *Carruthers v. Sydebotham* a valid authority; for, there the accident happened in the ordinary course of the voyage; and on that ground the underwriters were held not to be liable. Here, the loss did not so happen, for we cannot suppose that these canals are so often wanting repair as to make the draining off the water an occurrence in the ordinary course of a voyage. I think, therefore, that, in this case, the vessel was stranded."

(b) 3 Barn. & Adolph. 20.

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and, the vessel having strained, some damage was sustained by the cargo, but no lasting injury by the vessel. The Court (Mr. Justice *J. Parke* dissenting) held that this was a stranding within the meaning of that word in the policy.]

Mr. Serjeant *Wilde* and Mr. Serjeant *Stephen*, on a subsequent day in the 'same term, shewed cause.—It clearly appeared from the evidence, that the vessel took the ground in the usual course; for, the harbour being a tide-harbour, vessels going in there must necessarily lie on the ground at every ebb of the tide: and the finding of the jury negatives the supposition that the grounding was accidental. The direction was perfectly unexceptionable. The position of the ship was in no degree altered; but she took the ground precisely in the spot intended by the harbour master. The case of *Carruthers v. Sydebotham* is distinguishable. There, the vessel was placed, contrary to the advice of the master, in the place where the accident happened, and she had not reached the position in which she was intended to lie. In *Bishop v. Pentland* (a), the stranding was the effect of accident or negligence. Mr. Justice *Bayley* there said (b): "A stranding may be said to take place where the ship takes the ground, not in the ordinary course of the navigation, but by reason of some unforeseen accident." Here, the ship was not stranded by accident, or out of the ordinary course of the voyage. In *Hearne v. Edmunds* (c), a vessel with a cargo on board took the ground on two successive days in going up *Cork* harbour under the direction of a pilot, and being afterwards moored in the usual course, was thrown on her broadside by the receding of the tide, and received a considerable injury; it was held that this was not a stranding within the meaning of the po-

(a) 7 Barn. & Cress. 219; S. C. 1 Man. & Ryl. 49.

(c) 4 J. B. Moore, 15; S. C. 1 Brod. & Bing. 388.

(b) 7 Barn. & Cress. 224.

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licy. *Fletcher v. Inglis* was not a case of stranding. In *Rayner v. Godmond*, the accident happened before the vessel had arrived at her destination, and did not arise from the voluntary act of the master. In *Barrow v. Bell* (a), Mr. Justice Bayley said: "The ship in this case was laid on the strand, not in the ordinary course of navigation, but, *ex necessitate*, to avoid an impending danger:" thus recognizing the distinction taken in the preceding cases. Here, the place in which the vessel settled was precisely that selected by the harbour master; the injury, therefore, resulting from her falling over, was not one of the perils insured against. The case would have been different had the ship been driven into port out of the usual course of her voyage; but an injury resulting from the effecting the intention of the assured or his agents, and from their voluntary and deliberate acts, is not one for which the assurer is responsible.

Mr. Serjeant *Taddy*, in support of his rule.—It is true, that, when a vessel is bound for a tide-harbour, it is in the contemplation of the parties that she shall be placed on the strand or bottom of the harbour; but it is contemplated that she shall be so placed as to receive no injury; and the underwriter is clearly responsible for any damage that may result from her accidentally falling in a manner different from that which is usual. Here, the accident was unforeseen.

(a) 4 Barn. & Cress. 736; S. C. 7 Dow. & Ryl. 244. There, in *assumpsit* on a policy of insurance on goods warranted free from average, unless the ship was stranded, it appeared, that, in the course of the voyage, the ship was, by tempestuous weather, forced to take shelter in a harbour, and, in entering it, struck upon an anchor,

and, being brought to her moorings, was found leaky and in danger of sinking, and on that account was hauled with warps higher up the harbour, where she took the ground, and remained fast there for half an hour: it was held that this was a stranding within the meaning of the policy.

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[Lord Chief Justice *Tindal*.—The injury was unforeseen; the stranding not so.]

It may be conceded, that, to constitute a stranding, it must be the result of some unforeseen accident. The words of the memorandum “unless stranded,” are words of condition; and, if such condition happens, it destroys the exception, and gives rise to the general liability of the underwriter upon the policy. In *Burnett v. Kensington*(a), in an action upon a policy containing this condition, it was held, that, if the ship be in fact stranded in the course of the voyage, the underwriters are liable for an average loss arising from the perils of the sea, though no part of the loss arise from the act of stranding. *Bishop v. Pentland* is precisely in point. There, a ship having goods on board which were insured, but warranted free from average, unless general, or the ship should be stranded, was compelled in the course of her voyage to put into a tide-harbour, and was there moored alongside a quay, in the usual place for ships of her burthen. It became necessary, in addition to the usual moorings, to fasten her by tackle to posts on the shore, to prevent her falling over upon the tide leaving her. The rope with which she was so fastened, not being of sufficient strength, broke when the tide left the vessel, and she fell over upon her side, and was thereby stove in and greatly injured: it was held that this was a stranding within the meaning of that word in the policy, and that the underwriters were liable for a partial loss, although the stranding might have been occasioned remotely by the negligence of the crew in not providing a rope of sufficient strength to fasten the vessel to the shore. *Barrow v. Bell* and *Carruthers v. Sydebotham* are also authorities to the same effect. In *Rayner v. Godmond* Mr. Justice *Bayley* says(b): The fair construction of the

(a) 7 Term Rep. 210; S. C. 1
Esp. Rep. 416.

(b) 5 Barn. & Ald. 227.

words of the memorandum must be, that when, in the ordinary course of the voyage, the ship must go on the strand, the underwriter is exempt; but where it arises from *accident*, and out of the ordinary course, he is liable." And Mr. Justice *Best* said: "Here, the accident producing the loss was one not to be expected. In the case in the *Common Pleas* (*Hearne v. Edmunds*), the event must happen every tide." Can it be said that, in this case, the accident producing the loss was one that was to be expected? or that the same injury must happen every tide? The common sense of the thing is, that the vessel fell over, in consequence of the breaking of the rope, in a manner different from the ordinary gradual settlement that would have been occasioned by the dropping of the tide.

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Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court:—

This was an action on a policy of insurance on wheat on board the ship the *The Lady Anne*, at and from London to *Dunkirk*. The policy contained the usual memorandum by which corn, &c., were warranted free from average, unless general, or the ship be stranded. The plaintiff declared for an average loss upon the wheat by the stranding of the ship. At the trial the only question that arose was, whether there was a stranding of the ship or not: as to which the facts were these:—*Dunkirk* harbour is a tide-harbour, being nearly dry at low water. The ship entered the harbour about the time of high water, and was moored fore and aft to the shore, by order of the harbour master, in a place pointed out by him, where other vessels had been moored; and was also fastened by a running tackle from the main-mast-head to a post on the shore, for the purpose of preventing the ship from settling over as the tide fell. Whilst the tide was ebbing, and before

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the ship took the ground (though, as to the precise time, there was contradictory evidence), the rope of the running tackle broke, and after the ship had settled it was discovered, that, in taking the ground, she had struck against some hard substance, by means of which two holes were made in the bottom of the ship, in the second or third streak from the keel, and the water flowing through these holes had injured the ship, and also done some considerable damage to the cargo. Upon the fact whether the ship took the ground precisely in the place and in the manner she would have done if no accident had happened to the rope, there was contradictory evidence. At the trial the jury were directed, that, if the ship took the ground merely in consequence of the ebbing of the tide, and at the very place where it was intended she should at the time she was moored, then there was no stranding within the meaning of the policy; but that, if, in consequence of the breaking of the rope, or any other casualty, the ship took the ground, not in the place where it was intended she should settle by the ebbing of the tide, but in some other and different place, then there was a stranding. The jury found for the defendant; thereby in effect declaring that the ship had taken the ground merely through the ebbing of the tide, and in the very place where it was intended she should: and negating that, from the breaking of the rope, or any other accident, she had settled in a different place.

A rule was obtained for a new trial, upon the ground of a misdirection to the jury; but, after hearing the arguments of counsel against and in support of the rule, we think, upon these facts, the direction of the Judge and the finding of the jury were right, and that a new trial ought not to be granted.

That the injury done to the ship or goods by settling on a hard substance at the bottom of the harbour, would be a damage recoverable on a policy on a ship, or a policy

on goods not included in the memorandum, as an injury occasioned by perils of the sea, is beyond all doubt. But the question is, whether, as the goods insured fall within those enumerated in the memorandum, the present case is taken out of the exception contained in such memorandum, by reason of the ship being stranded; inasmuch as it has long been settled that the words "if the ship be stranded," are words of condition, and that, if such condition happens, it destroys the exception, and lets in the general words of the policy (a). In considering this case, therefore, it will be better to treat the fact, that the damage to the wheat was occasioned by the very act of the ship's taking the ground, as a circumstance altogether immaterial in the determination of the question; for, if the ship was *stranded* in *Dunkirk* harbour, an average loss upon the wheat would be equally recoverable, though it happened from perils of the sea at any former time or any other place in the course of the voyage insured. In this point of view, it is of very great consequence that the meaning of the word "stranding" should be distinctly understood.

Now, it is perfectly clear, and has been settled by various decided cases, that, by the term "stranding," neither of the contracting parties could intend a taking of the ground by the ship in the ordinary course of navigation used in the voyage upon which she was engaged. It is needless, therefore, to say, that, when a vessel in the course of the voyage insured, is sailing in a tide river, or puts into a tide-harbour, the taking the ground from the natural cause of the deficiency of water occasioned by the ebbing of the tide, is no stranding within the meaning of the policy: otherwise, at every ebb of the tide, there would be a stranding, and the memorandum intended for the security of the underwriter against partial losses upon

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(a) See *Burnett v. Kensington*, 7 Term Rep. 210.

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perishable commodities would be altogether nugatory, as the smallest injury to the cargo, occasioned at an early part of the voyage, would always be a loss within the policy, by reason of the ship discharging her cargo in a tide-harbour. The mere taking of the ground, therefore, in a tide-harbour, in the place intended by the master and crew or the proper officers of the harbour, cannot, upon any principle of construction or common sense, be held to constitute a stranding. What more, then, is necessary? We think a stranding cannot be better defined than it has often been in several of the decided cases, *viz.* where the taking of the ground does not happen solely from those natural causes which are necessarily incident to the ordinary course of the navigation in which the ship is engaged; but, either wholly or in part, from some accidental or extraneous cause. Such was the case in *Carruthers v. Sydebotham* (a), where the ship was taken by the pilot who had her in charge, against the direction of the master, and moored in an improper place. Such also was the case in *Barrow v. Bell* (b), where, the vessel having struck on an anchor, whereby she sprung a leak, and being in danger of sinking, was in consequence warped further up the harbour of *Holyhead*, where she took the ground. Such, again, was the case of *Bishop v. Pentland* (c), where the ship, having entered a tide-harbour by stress of weather, was moored fore and aft, with the addition, as in the present case, of a tackle from her main-mast fastened to posts on the pier, to prevent her falling over. The rope, being of insufficient strength, broke, and by means thereof the ship fell upon her side, whereby she was stove in and injured. Such, lastly, was the case of *Wells v. Hopwood* (d), very recently decided in the *King's Bench*, in which case the ship, having arrived in *Hull* harbour

(a) 4 Mau. & Selw. 77.

(c) 7 Barn. & Cress. 219; S. C.

(b) 4 Barn. & Cress. 736; S. C.

1 Man. & Ryl. 49.

7 Dow. & Ryl. 244.

(d) 3 Barn. & Adolph. 20.

(which is a tide-harbour), was in the course of discharging her cargo at a quay alongside of which she was moored. At low water she grounded on the mud, but, on one occasion, the rope by which her head was moored to the opposite side of the harbour stretched, and the wind blowing from a particular quarter, instead of grounding entirely on the mud, as it was intended she should have done, she partly grounded on a bank of rubbish and stones. This grounding was held by a majority of the judges to be a stranding within the meaning of the policy. Now, all these cases were decided upon the principle that the taking the ground was occasioned by some extraneous and accidental cause, and was not a taking of the ground in the usual course of navigation.

We cannot distinguish the present case from those above referred to; and we think the attention of the jury was called to the very point to which it ought to have been directed, *viz.* whether the grounding was such as the master and crew intended, that is, by the ebbing of the tide, in the ordinary course of navigation; or whether the grounding in the particular spot where she took the ground was the effect of accident. Upon the facts before them we think the jury found a right verdict, and therefore that the *postea* should be delivered to the defendant.

Postea to the defendant.

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After a payment of money into Court in a cause, the parties agreed to refer the settlement of the accounts between them to arbitration:—*Held*, that the arbitrators had no power over the costs in the cause up to the time of the payment into Court.

STRATTON v. GREEN.

THIS was an action by an outgoing against an incoming tenant, to recover the value of certain fixtures. The defendant had obtained a rule for payment of money into Court, under which he paid in the sum of 44*l.* 18*s.* 2*d.* The parties afterwards entered into a negotiation as to referring the further demand of the plaintiff, so as not to compromise the existing rights of either party in the suit. By this agreement, the arbitrators were empowered "to balance the accounts between the parties, and settle all matters in dispute respecting the leaving and occupying of two corn-mills and a dwelling-house." The arbitrators made their award, ordering the defendant to pay to the plaintiff 46*l.* 10*s.*, and that each party should pay his own law expenses.

Mr. Serjeant *Wilde*, on a former day in this term, obtained a rule *nisi* that the Prothonotary might be directed to tax the plaintiff his costs in the cause up to the time of the payment of the money into Court.—He submitted that the cause not being referred, the arbitrators had no authority to award as to the costs.

Mr. Serjeant *Heath* now shewed cause.—He contended that the submission was virtually a reference of all matters in difference between the parties, including the cause; and therefore that the arbitrators had jurisdiction over the costs.

Mr. Serjeant *Wilde*, in support of his rule.—The reference here was only for the purpose of ascertaining the balance of the accounts between the plaintiff and the defendant. By paying money into Court, the defendant

admits his liability at least to that extent. The plaintiff is therefore clearly entitled to costs up to that time.

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Lord Chief Justice TINDAL.—If I could see that this was intended to be a reference of the cause, I should hold the plaintiff not entitled to his rule: but I cannot perceive that the cause was in fact referred. It appears that, after the defendant had paid money into Court, and thereby admitted that so much was due to the plaintiff, the parties agreed to submit the rest of their differences to arbitration. It seems to me therefore that the plaintiff is entitled to take the money out of Court, and to have his costs up to the time of paying it in.

Mr. Justice PARK concurred.

Mr. Justice GASELEE.—Although I admit the justice of the case to be with the opinions expressed by my Lord Chief Justice and my Brother *Park*, yet I incline to think it not altogether consistent with the law: for, I look upon this reference as a reference of the cause, which gave the arbitrators power over the costs.

Mr. Justice ALDERSON.—I think the fair construction of the agreement to refer in this case is that which has been put upon it by the majority of the Court, *viz.* a reference, not of the cause, but of the rest of the matters in difference, after the payment into Court.

Rule absolute.

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Where witnesses are called to substantiate charges contained in counts upon which the defendant obtains a verdict, it is in the discretion of the Prothonotary to allow or disallow their expenses, as he may conceive their evidence material to those counts upon which the plaintiff succeeds.

ANDREWS v. THORNTON.

THIS was an action upon the case for slander.

The first count of the declaration, after the usual introductory averments, stated, that, before the committing of the grievances by the defendant as thereafter mentioned, the plaintiff had been and then was a mariner, and the employment of a mariner had used and exercised with great credit and profit to himself, to wit, at, &c.; that the plaintiff, in certain parts beyond the seas, to wit, at *Singapore*, had shipped himself in and on board of a certain ship or vessel called the *Vittoria*, as a mariner and chief mate for a certain voyage, to wit, from *Singapore* aforesaid to *London*, of which said ship or vessel the defendant had been and then was freighter, to wit, at, &c.; that, before the arrival of the said ship or vessel at *London*, to wit, on the high seas, a mutiny of divers of the crew of the said ship or vessel had broken out in and on board of the said ship or vessel, and the master or commander and divers mariners belonging to the crew of the said ship or vessel had been killed, and divers large quantities of the cargo of the said ship or vessel had been thrown overboard by the mutineers, to wit, at, &c.; that the said plaintiff, being employed as a mariner in and on board of the said ship or vessel as aforesaid, having, with the assistance of certain of the crew of the said ship or vessel, recovered the same from the power and control of the said mutineers, and having taken upon himself the command and navigation of the said ship or vessel, had proceeded with the same to a certain port in parts beyond the seas, to wit, the *Mauritius*, the same being the most eligible port to proceed to after such mutiny as aforesaid, to wit, at, &c.; that the plaintiff, at the *Mauritius* aforesaid, had necessarily been obliged to discharge and unload the cargo of the said ship or vessel, and to reload the same in and on board the said

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ship or vessel at a very considerable expense, and in so doing had employed one *William Aiken* as agent for the said ship or vessel for that purpose, and, having done so, the plaintiff had safely and securely navigated and brought the said ship or vessel, together with her cargo so re-loaded as aforesaid, to her port of delivery, to wit, at, &c.: nevertheless, the defendant, well knowing the premises, but greatly envying the happy state and condition of the plaintiff, and contriving, and wickedly and maliciously intending, to injure the plaintiff in his good name, &c., on, &c., at, &c., in a certain discourse which the defendant then and there had, of and concerning the said plaintiff, and of and concerning his said employment as a mariner in and on board of the said ship or vessel, and of and concerning the said cargo of the said ship or vessel, in the presence and hearing of divers good and worthy subjects of this realm, then and there, in the presence and hearing of those last-mentioned subjects, falsely and maliciously spoke and published of and concerning the said plaintiff, and of and concerning his said employment as a mariner in and on board of the said ship or vessel, and of and concerning the said cargo of the said ship or vessel, these false, scandalous, malicious, and defamatory words following, that is to say—"There was no reason for discharging the cargo. I do not believe that more than 100*l.*, or at most 200*l.* worth of the cargo was thrown overboard by the mutineers: and I believe that *Andrews* (the plaintiff) has connived with Mr. *Aiken*, the agent at the *Mauritius*, in creating expense, for the purpose of putting money in his pockets: he ought to be tried at the bar of the *Old Bailey*; and no respectable merchant will ever employ him."

The declaration contained several other counts varying the statement of the words spoken. In the ninth and tenth counts, the words charged were—"He ought to be tried at the *Old Bailey*."

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The defendant pleaded the general issue.

At the trial, before Lord Chief Justice *Tindal*, at the Sittings in *London* after the last term, the jury found a verdict for the plaintiff upon the ninth and tenth counts, and for the defendant upon the first eight. The Prothonotary, on taxing the plaintiff's costs, allowed, amongst others, a sum of 35*l.* paid for the expenses of witnesses from *Liverpool*, who were brought to prove the plaintiff's professional skill; and a further sum of 4*l.* for a witness who was called to prove the mutiny on board the vessel.

Mr. Serjeant *Spankie*, on the part of the defendant, on a former day in this term, obtained a rule *nisi* that the Prothonotary might be directed to review his taxation as to these particulars.—He submitted that the officer ought only to have allowed the expenses of those witnesses whose testimony was applicable to those counts upon which the plaintiff had recovered; and that, as there was no averment of special damage, and no plea of justification, the skill of the plaintiff as a mariner could not possibly come in question at the trial, and therefore the witnesses called for the purpose of proving that, ought not to have been allowed for.

Mr. Serjeant *Wilde*, *contra*, submitted that all the evidence adduced was fairly within the case that the plaintiff was entitled to make out, and necessary to the estimation of the injury inflicted upon him by the slander.

Mr. Serjeant *Spankie*, in support of his rule.—All the evidence that was necessary to the support of the two last counts was, the proof of the words spoken, and their effects. The inducement as to the facts antecedent to the arrival of the ship at the *Mauritius*, was quite immaterial to the question at issue. Under these pleadings, all that the parties went down to try was, whether the words

were spoken or not: for, the record admitted that they were not true.

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Lord Chief Justice TINDAL.—I concur in one observation that has been made on the part of the defendant, *vis.* that, where, in an action for slander, no justification is pleaded, the same witnesses need not be called by the plaintiff that would be requisite in case a justification had been put upon the record. The present case, however, does not stand upon that precise footing. The words in the ninth and tenth counts were not *per se* actionable; but could only be made out to be so by proof of the matters alleged in the inducement. It therefore became necessary to support that inducement by proof. The only question here is, whether the plaintiff has in this respect abused the liberty the law allows him, and unnecessarily incumbered the proof. It appeared that the defendant, when applied to by a person of the name of *Thompson*, said that the plaintiff ought to be tried at the bar of the *Old Bailey*; and added that he should take care that his character should be well known. The charge conveyed in these words is very general, and required explanation. It was clearly competent to the plaintiff to shew the circumstances out of which the accusation arose. We must not be too nice in placing bounds to the plaintiff's proof. A discretion is reposed in the Prothonotary, to determine whether or not witnesses have been properly called. There is nothing in this case so extravagant as to call for the interference of the Court.

The rest of the Court concurring—

Rule discharged, with costs.

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WALKER v. WATSON.

By the *Halifax* court of conscience act, 17 Geo. 3, c. xv, s. 30, it is enacted that no plaint, &c., entered in that court for any debt or damages under 5*l.*, arising within its jurisdiction, shall be removed by *re. fa. lo.*, *certiorari*, writ of false judgment, or otherwise howsoever. The defendant having sued out a writ of false judgment to remove a plaint, on the ground that the original debt exceeded 5*l.*—The Court set it aside, with costs.

THE plaintiff was sued in the *Halifax* Court of Conscience for a debt below 5*l.*, being the balance of a bill of exchange for 17*l.*, drawn at *Leeds*, and accepted by the plaintiff, payable at *Masterman & Co.'s, London*. Both parties were resident within the jurisdiction of the court. The plaint having been removed after judgment from the court of conscience, by writ of false judgment—

Mr. Serjeant *Merewether*, on the part of the plaintiff below, on a former day in this term, obtained a rule *nisi*, to set aside the writ, with costs, on the ground that the plaint was not removeable. He referred to the 30th section of the statute which constituted the *Halifax* court, *vis.* the 17 Geo. 3, c. xv—by which it is enacted, “That no plaint, suit, or action to be entered or commenced in this court for any debt or damages under 5*l.*, arising within the said honor, or any judgment or other proceedings to be had thereon, shall be removed or removeable by any writ of *recordari facias loquelam*, *certiorari*, false judgment, or otherwise howsoever; but such judgments in this court shall be final and conclusive to all intents and purposes whatsoever.”

Mr. Serjeant *Jones* now shewed cause.—The act in question does not apply to a case like the present, where the debt arises on a bill of exchange payable in *London*; for, the debt or damage clearly was not arising within the jurisdiction of the *Halifax* court: neither does the act extend to the case of a debt originally exceeding 5*l.* In *M'Collam v. Carr* (a), the Court refused to allow a suggestion to be entered for double costs under the *Middlesex*

(a) 1 Bos. & Pull. 223.

court of conscience act, 23 Geo. 2, c. 23, where the original debt, being above forty shillings, had, by a balance of accounts, been reduced below that sum. Lord Chief Justice *Eyre* there said: "The action arises on a contract, part of which has been satisfied by money on account. Is there any case where the ultimate balance of an account only being under forty shillings, the Court has allowed a suggestion? I should pause upon such a case, since the most intricate point in accounts between merchant and merchants might, by this means, come to be decided before a county court. It seems to me that the original demand ought to be under forty shillings."

Mr. Serjeant *Merewether*, in support of his rule, was stopped by the Court.

Lord Chief Justice TINDAL.—It appears to me that the whole question in this case turns upon the words of the section to which we have been referred. Those words are—"That no plaint, suit, or action to be entered or commenced in this court for any debt or damages under 5*l.*, arising within the said honor (the honor of *Halifax*), or any judgment or other proceedings to be had thereupon, shall be removed or removable by any writ of *recordari facias loquelam, certiorari*, false judgment, or otherwise howsoever; but such judgments in this court shall be final and conclusive to all intents and purposes whatsoever." Upon this section, therefore, the only question is, whether this was a plaint entered in the court of conscience for a debt or damage under 5*l.* I cannot agree, that, if the debt originally exceeded 5*l.*, the party may not enter his plaint in the inferior court. There are many old cases that have decided that he may. Although it has been suggested that the debt arose out of the jurisdiction of the *Halifax* court, it being for the balance of a bill of exchange payable in *London*, and that the debt arose where the default was made;

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yet, upon the affidavits, it appears that both the parties were residing within the jurisdiction of the inferior court: and the default was not confined to the place where the bill was made payable. Acts of parliament erecting courts so beneficial to the poorer suitor, ought to be so construed as to give them the fullest effect. Upon the fair construction of this act, I am clearly of opinion that the writ of false judgment does not lie.

The rest of the Court concurring—

Rule absolute, with costs (a).

(a) See the case of *Scott v. Bye*, 9 J. B. Moore, 649; S. C. 2 Bing. 344.



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In debt on a judgment, the defendant pleaded in bar a release dated in December, 1831, but destroyed by time and accident. Upon an affidavit that the plea was false, the Court gave leave to the plaintiff to sign judgment as for want of a plea.

SMITH v. HARDY.

THIS was action of debt on a bond. The defendant pleaded a release, bearing date in *December*, 1831, destroyed by time and accident.

Mr. Serjeant *Wilde*, on a former day in this term, obtained a rule *nisi* for judgment as for want of a plea, upon an affidavit that the plea was false.

Mr. Serjeant *Adams* now shewed cause.—The Court has no right to inquire into the truth of such a plea as this. The case of *Richley v. Proone* (a), where the Court of *King's Bench* permitted the plaintiff to sign judgment notwithstanding a plea of accord and satisfaction, upon an affidavit that such plea was false, was over-ruled by the subse-

(a) 1 Barn. & Cress. 286; S. C. 2 Dow. & Ryl. 661.

quent case of *Merrington v. Beckett* (a). And in *Smith v. Backwell* (b), in an action against the drawer of a bill of exchange, the defendant pleaded the delivery of twenty pipes of port wine in satisfaction, and this Court refused to allow the plaintiff to sign judgment as for want of a plea, although it was sworn that the plea was altogether false.

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Mr. Serjeant *Wilde*, in support of his rule.—All that the Court decided in *Smith v. Backwell* was, that the Court will not interfere on the mere ground of the falsity of the plea, where it raises only one simple issue, and is not of a nature to create doubt and perplexity or expense. Mr. Justice *Gaselee* there said (c) “So long as a judgment recovered is permitted to be pleaded, I see no reason why this plea, which is equally common, should not be allowed also. It involves no difficulty, nor is it so subtilly framed as to require the advice of counsel, nor does it raise two distinct issues, so as to require different modes of trial.” The plea in this case does tend to the raising of two distinct issues; therefore, upon the authority of *Smith v. Backwell*, the plaintiff is entitled to sign judgment.

Lord Chief Justice TINDAL.—If the plea in this case had been such that only one issue could have been taken upon it, I am not prepared to say that it might not have been allowed to stand upon the record—for instance, had the latter part of the plea been omitted, and *profert* made of the alleged release. But this is an ingeniously drawn plea, calculated to raise a doubt in the mind of the plain-

(a) 2 Barn. & Cress. 81; S. C. 3 Dow. & Ryl. 231. In the report of this case in 2 Barn. & Cress. 81, the Court say—“The truth of a plea of *release* had been inquired into, because a Court of equity

would entertain the question; and this Court only does that in a less expensive way.”

(b) 2 Moore & Payne, 338; S. C. 4 Bing. 512.

(c) 2 Moore & Payne, 346.

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tiff's attorney, and to cause him to seek the advice of a pleader: it raises two distinct issues—first, upon the fact of the release being the deed of the plaintiff—secondly, upon the fact of its destruction by accident. I therefore think this case falls within the principle of *Shadwell v. Berthoud* (a), *Body v. Johnson* (b), and *Corbett v. Powell* (c). In the former of these cases it was expressly decided, that, where a plea is so framed as that it may reasonably induce the plaintiff to consult counsel, in order to know how to deal with it, the Court will, on affidavit that such plea is wholly false, permit the plaintiff to sign judgment as for want of a plea. The Court there said: "The plea was obviously for the purpose of gaining time, and would naturally induce the attorney for the plaintiff to consult counsel upon it; and, in such cases, if the plea be false, the Court will permit judgment to be signed." I am fully disposed to uphold the authority of those cases.

Mr. Justice PARK.—I am of the same opinion. The true distinction is that taken by my Brother Gaselee in the case of *Smith v. Backwell*.

Mr. Justice GASELEE.—In *Smith v. Backwell*, there was nothing improper on the face of the plea, Whereas here, the plea is improper upon the face of it; it goes out of the regular course, and raises different issues. It is clearly and palpably false; for, it cannot be imagined that a release of so late a date as *December* last should at this early period be lost by *time* and accident. In earlier times parties were heavily fined for putting false pleas upon the record.

Mr. Justice ALDERSON concurred.

Rule absolute (d).

(a) 1 Barn. & Ald. 750; S. C. *nomine Shadbolt v. Berthoud*, 1 Dow. & Ryl. 446.

(b) 1 Barn. & Ald. 751, n.

(c) *Ibid*; S. C. 1 Dow. & Ryl. 448.

(d) And see *Jones v. Studd*, 1 Moore & Payne, 643. To a de-

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BROWN v. M'CULLOCK and two Others.

Saturday,
May 12th.

THE original writ in this case was issued into *Denbighshire*; two of the defendants were served there, and the third in *Lancashire*. The appearance for the latter having been entered with the filacer for *Lancashire*, the plaintiff, treating the plea pleaded as a nullity, signed judgment, there being no proper appearance for the third defendant.

The appearance must be entered in the county into which the original writ issues, though the service be of an *alias* into another county.

Mr. Serjeant *Wilde*, on a former day in this term, obtained a rule *nisi* to set aside this judgment for irregularity.—He submitted that the appearance in the county where the party was served was sufficient.

Mr. Serjeant *Andrews*, *contrà*, contended that the established practice was, that the appearance must be entered in the county into which the original writ issues. He

claration in *assumpsit*, containing a count on a bill for 857*l.* 10*s.*, with a count for goods sold, and the usual money counts, the defendant pleaded—as to the *second* and subsequent counts, except as to the sum of 857*l.* 10*s.*—*non assumpsit*; and—as to the said sum of 857*l.* 10*s.*—that, after the making of the promises, and before the commencement of the suit, he drew a bill on *F. L. & Co.* for that sum, and indorsed it to the plaintiffs, to whom the defendant was till liable on it, and—as to the promise in the *first* count mentioned—that, before the said bill became due, the plaintiffs indorsed it to third persons, to whom the defendant was still liable. On

an affidavit that the plea was false, the Court ordered it to be struck out, unless the defendant would consent to withdraw it, and undertake to plead issuably within two days, and to take short notice of trial for the Sittings after the term.

See also *Poole v. Salter*, 2 Crompt. & Jervis, 85; *S. C.* 2 Tyr. 139, where the Court of *Exchequer* refused to set aside a plea of judgment recovered, on affidavit of its being totally false, though there did not remain time for the plaintiff to get judgment in the term, he having neglected to take the regular steps for that purpose in the earlier part of the term.

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cited *Tidd's Practice* (a), where the rule is laid down to that effect.

Lord Chief Justice TINDAL.—The only question here is, whether the appearance of one of the defendants was entered in the proper county. The original writ issued into *Denbighshire*, where two of the defendants were served. There was afterwards an *alias* issued into *Lancashire*, in order to serve the other defendant, who was resident there. The defendant who was served in *Lancashire* must have seen by the recital of the *alias* that the original had issued into *Denbighshire*. The practice clearly is, that the appearance must be entered in the county into which the original writ is directed. The appearance therefore in *Lancashire* was irregular. It was, however, a mere mistake, and therefore I think the judgment should be set aside, though not for irregularity,—the defendants paying costs.

The rest of the Court concurring—

Rule absolute, on payment of costs (b).

(a) *Tidd*, 9th edit. p. 238.

(b) By the statute 13 Car. 2, c. 2, s. 3, upon an appearance for the defendant by attorney of the term wherein the process is returnable, unless the plaintiff declare before the end of the term then next following after appearance, judgment of *non pros.* for want of a declaration may be entered against him. In *Inwood v. Mawley*, 3 Barn. & Cress. 553; S. C. 5 Dow. & Ry. 350, it was held that the statute contemplated such an appearance as would entitle the

plaintiff to declare; therefore, where a *latitat* issued in 1823, returnable in *Trinity Term*, against three defendants, one of whom was served with process before the return thereof, but the others were not brought into Court until *Easter*, 1824, of which term an appearance was entered for all the defendants, and the plaintiff having neglected to declare before the end of the term next following, it was held that the defendants might sign judgment of *non pros.* under the statute.

Regulæ Generales.

REGULATIONS FOR THE EASTER HOLIDAYS.

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IT IS ORDERED that the days between *Thursday* next before, and the *Wednesday* next after *Easter* day, shall not be reckoned or included in any rules or notices or other proceedings, except notices of trial and notices of inquiry in any of the Courts of law at *Westminster*.

The days between *Thursday* in *Holy* week and *Wednesday* in *Easter* week, to be reckoned only in notices of trial or inquiry.

TENTERDEN.

J. PARKE.

N. C. TINDAL.

W. BOLLAND.

LYNDHURST.

J. B. BOSANQUET.

J. BAYLEY.

W. E. TAUNTON.

J. A. PARK.

E. H. ALDERSON.

J. LITTLEDALE.

J. PATTESON.

S. GASELEE.

J. GURNEY.

J. VAUGHAN.

POSTEAS AND INQUISITIONS.

IT IS ORDERED by the Court, that, after the *posteas* and inquisitions have been left with the clerk of the judgments, conformably with the rule of Court made in *Trinity* Term, 13 *Geo. 2*, it shall be lawful for the clerk of the judgments

The clerk of the judgments may allow the *posteas* and inquisitions to be taken out of the office—

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REG. GEN.
the attorney or
agent to return
them the same
day.

to permit the same to be taken out of the office for the purpose of being produced to the sealer of the writs, in order to obtain a writ of execution; and it is hereby further ordered that the attorney or agent who procures such *postea* or inquisition from the office of the clerk of the judgments, shall cause the same to be returned again to the said office during the office hours of that day.

N. C. TINDAL.

J. A. PARK.

S. GASELEE.

E. H. ALDERSON.

END OF EASTER TERM.

In the House of Lords.

EASTER VACATION, 2 WILL. IV.

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MIREHOUSE and Another, who have survived GEORGE,
Bishop of LINCOLN, v. RENNELL, Widow.

Friday,
May 25th.

THIS was a *quare impedit*. The case came on for argument in the Court of *Common Pleas*, on demurrer to the pleas of *Thomas Henry Mirehouse* and *William Squire Mirehouse*, the plaintiffs in error, two of the defendants below, in *Hilary Term*, 5 & 6 *Geo.* 4, and in *Easter Term*, 6 *Geo.* 4. In the following *Michaelmas Term*, the Court gave judgment for the defendants—Mr. Justice *Gaselee* dissenting (a). The cause was afterwards removed by writ of error into the Court of *King's Bench*, and after argument that Court (Lord *Tenterden* dissenting) reversed the judgment of the Court of *Common Pleas* (b). A writ of error was then sued out by the two surviving original defendants, to remove the cause into the *House of Lords*.

An advowson belongs to a prebendary in right of his prebend, and the church becomes vacant, and the prebendary dies without having presented:—*Held*, that the right of presentation belongs to his personal representative.

Upon the argument there, the question submitted for the opinions of the Judges was as follows:—

(a) See 11 J. B. Moore, 139—3 Bing. 223.

(b) See 7 Barn. & Cress. 113; S. C. 9 Dow. & Ryl. 810.

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“ An advowson belongs to a prebendary in right of his prebend, and the church becomes vacant, and the prebendary dies without having presented, does the right of presentation belong to the personal representatives?”

The opinions of the eight Judges who assisted at the argument were on this day delivered *seriatim*.

Mr. Justice BOSANQUET.—In offering my humble reasons to your lordships for answering this question in the affirmative, I propose, with permission, to consider it—first, with reference to the right of presentation itself, to which the question relates—secondly, with reference to the person (a prebendary of a cathedral church) to whom the right first accrued—thirdly, with reference to the deceased prebendary's personal representative, whose right is the immediate subject of the question.

1. With respect to the first point, I take it to be clear that the patron's right of presentation to an ecclesiastical benefice is a temporal right. It is expressly said by *St. Jerman*, in the 36th chapter of the *Doctor and Student* that the right of presentation is a temporal thing and a temporal inheritance. It was insisted, however, at your lordships' bar, that the right of presenting is a personal spiritual trust; and the authority of Bishop *Gibson* was relied on in support of that position. Bishop *Gibson* (a) does indeed question the propriety of calling it a temporal inheritance, or that it ought legally speaking to be considered otherwise than as a spiritual trust. But he refers to no authority in support of his view of the subject. And, in the very same chapter in which he suggests this doubt, he says that the right of nominating, which at first was annexed to the person building or endowing the church, became by degrees appendant to the manor in which it

(a) Codex, tit. 33, ch. 1.

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was built; that the right of advowson, though appendant to a manor, castle, &c., may be severed from it; and that, being severed, it becomes an advowson in gross: and he calls the right itself an incorporeal inheritance, which may be granted by deed or will.

The grounds upon which it has been considered that the advowson or patron's right to present is a temporal and not a spiritual inheritance, are well stated by *Godolphin* (a), who was, as your lordships know, an eminent civilian and king's advocate after the restoration of King *Charles* the Second. "It hath ever been held," he says, "that, by the common law, an advowson is a temporal inheritance;" for which he gives the following reasons—"that it lieth in tenure, and may be holden either of the King or of a common person, and hath been held of the King *in capite* or in knight's service; that a writ of right of advowson lieth for him who hath an estate in an advowson in fee simple; that a *præcipe quod reddat* lieth for it; that a common recovery may be suffered of it; that an advowson, as other temporal inheritances, may be forfeited by attainder, or lost by usurpation, negligence, and other means there specified; that the wife shall be endowed thereof, and the husband be tenant by the curtesy; that it may be taken in coparcenery; that it may pass by way of exchange for other temporal inheritance; that, by grant of all lands and tenements, an advowson doth pass, and, if not by livery, yet by deed is transferable as other temporal inheritances which pass with the manors whereunto they are appendant."

It is said that the object of an advowson is of a spiritual nature, since it is to provide a spiritual person to serve the church: but the right to nominate such person is not the less a *temporal estate*. That right, according to Lord Chief Justice *Fleming* (b), is an interest and not authority.

(a) *Repertorium Canonicum*, 209. (b) *Starkie and Pool's case*, 1 Bulst. 28

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The spiritual interests of the church are provided for by subjecting the fitness of the person nominated to the judgment of the bishop; but the exercise of the patron's *right of nomination* is not subject to the jurisdiction of any Court but the King's temporal Courts. On this point, *Godolphin (a)* says—"It is sufficient for the ordinary's discharge if the presentee be able, by whomsoever he be presented; which authority is acknowledged on all sides to have ever been inherent in the ecclesiastical jurisdiction. But, as to the right of presentation itself, to determine who ought to present, and who not, and at what time, and when the church shall be judged to become void, and when not; all these appertain to the King's temporal laws."

It appears to me, therefore, my lords, to be indisputable, that a right of presentation is temporal property, the alienation of which must be governed by the rules and analogies of the common law; and that it is no more to be considered in contemplation of law as a trust, than all other temporal property for the proper use of which the owner is responsible *in foro conscientie*.

An advowson, being an incorporeal hereditament, may be taken by descent, conveyance, or devise, like other temporal property of that class. It may be limited in fee or in tail, for term of life, or for years. If the advowson be held in fee or in tail, it descends to the heir general or special; if for life, it passes to the remainder-man or reversioner: all these being freehold interests. A term of years or a single turn goes to the executor or administrator; such interests being less than freehold: and the whole estate or a portion of it, or a single turn only, may be sold for a pecuniary consideration. If, indeed, the church be vacant, the right of presentation for that turn cannot be granted by a subject, either for value or gratuitously. This restriction, however, is not peculiar to a right of presentation: it applies to an annuity or rent actually due,

which may be granted before the day of payment, but which cease to be alienable at law after they have accrued: yet the arrears in both cases are unquestionably temporal rights.

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The nature of the difference which subsists between the right to present on the next turn which may accrue, and the right of presentation to a vacant turn, it is now material to consider. The right to present upon the next turn which shall accrue is an interest carved out of the fee in the advowson, and, if re-conveyed to the owner of the fee, will merge. But the right of presentation to a vacant benefice, though arising from the advowson, is no part of it. It has sometimes been called a chattel, sometimes a *chose in action*, sometimes a fruit fallen. It is called (a) a mere personal thing; a thing in right, power, and authority; a thing in action; and, in effect, the fruit and execution of the advowson, and not the advowson. In *Co. Litt. (b)*, it is said to be, not *merely* a *chose in action*, for it survives the husband, which a bond does not. But, by whatever name it may be called, it is treated in law as a right of a nature distinct from the ownership of the advowson itself. In *Jenkins (c)*, it was held by all the Judges of *England*, that, where the next presentation to a church then void had been granted, the grant, being made by a subject, was void; "for, the present avoidance," it is said, "is a thing in action and privity, and vested in the *person* of the grantor (the patron), and is like a relief or arrear of rent, or an obligation, or a debt:" and it is added, "If a grantee of an annuity in fee grants an annuity for lives or years, it is good; for, this is an estate settled and of continuance; but a grant of the arrears of the annuity is void *causâ qua supra*:" that is, because the subject of the grant is become a *chose in action*. And, notwithstanding what is stated in the note to the case of *The Bishop of Lincoln*

(a) Dyer, 283.

(b) Co. Litt. 120. a.

(c) Jenk. Cent. 236.

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v. *Wolforstan* (a), respecting the fictitious nature of this reason, it appears to me fully warranted both by analogy and authority in point.

No instance can be shewn in our books, in which a right of presentation to a vacant church has accompanied the ownership of an advowson in the hands of a subject, if the person to whom the right of presenting accrued has ceased, either by death or otherwise, to hold the advowson.

If a right of presentation accrues to the owner in fee of the advowson, it does not pass to his heir. If the right accrues to a tenant in tail or tenant for life of the advowson, it does not pass to the issue in tail or the remainderman. But, in all these cases, it goes to the executor, as the representative of the personal rights of the individual to whom it accrued. If the right accrue to a lessee for years of the advowson, and the term expire within six months afterwards, the lessee is entitled to present, notwithstanding the expiration of the term, in preference to the reversioner. Upon what principle can such a claim be sustained, but upon that of a personal right vested in the individual during the term, distinct from his interest in the advowson? If a *feme covert* be entitled to an advowson, and the church become void during the coverture, and the husband survive, he shall present; but, if the avoidance happened before the coverture, he shall not present; such right being, as it is said, only a chattel real in action not reduced into possession during the coverture. And if the avoidance happen during the coverture, the husband shall present though he be not tenant by the curtesy; as in cases where the wife had but a life estate, or where there has been no issue of the marriage: and, in such case, if the husband himself die before presentment, his executor shall present, and not the heir (b). Can any rea-

(a) 3 Burr. 1512.

(b) Watson's Clerg. Law, ch. 9.

son be assigned for this but that the right which had accrued during the coverture was distinct from the estate in the advowson?

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The uniformity of the law in all these instances appears to me manifestly to shew the general rule to be, that the right to present to a vacant church vests in the individual to whom it accrues as a personal right, which, though accruing from the advowson, is no part of it, is not annexed to it, and does not follow it when it devolves upon any other person than the individual to whom the right of presentation first accrued. Two instances, indeed, may be mentioned, in which, though the right of presentation does not pass to the succeeding owner of the advowson, it does not pass to the personal representatives of the deceased individual to whom it first accrued. These are the cases of a bishop and a tenant *in capite* of the Crown, in both of which cases the right belongs to the King. This right of the King upon the death of a bishop is sometimes said to arise by reason of his title to the temporalities, and sometimes by reason of his prerogative. But it is equally consistent with either form of expression to say that it arises by reason of the relation in which a bishop stands to the King. The temporalities of a bishop, of which his advowsons form a part, are held of the King *per baroniam*. The title of the King to seize the temporalities upon the bishop's decease may reasonably be referred to the tenure by which they are held; and the further title to one of the fruits of these temporalities accrued during the life of the bishop, and vested in him as a chattel at his death, may, consistently with the analogies of the law, be referred to the same source.

That the right in question is a condition of the bishop's tenure *per baroniam*, there is great reason to suppose from the similarity of right which accrues to the King in the case of a tenant *in capite* by knight's service. If tenant *in capite* be seised of a manor with an advowson

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appendant, and the church become void; and he die, his heir within age, the King shall not only have the wardship with the right of presenting to such livings as become void during the infancy of the heir, but to any right of presentation which accrued during the life of his tenant. In this respect the case of tenant *in capite* is strictly analogous to that of a bishop; yet, if the land be holden by knight's service of a common person, and not of the King, the executors of the deceased tenant shall present, and not the guardian (a). And if tenant *in socage* be seised of an advowson and the church become void, and he die, his heir under age, the guardian *in socage* shall not present, but the executor or administrator. Sir *Edward Coke*, in one place, gives as a reason why the King shall present in the case of a bishop, that the presentation is but a *chose in action* (b), and, in another, that nothing shall be taken for the presentation, and therefore it is no assets (c). The circumstance of the presentment being a *chose in action* is a singular ground of objection to its going to the executor; and that of its not being assets would be equally applicable to the cases of a tenant who holds *in socage*, and to a tenant *paravail*, who holds by knight's service; in both which cases the executor is entitled. How far, indeed, it is quite correct to say that a presentation is not assets will be seen hereafter. If the right of the King to a presentation accrued before the bishop's death be not a condition of tenure, it may possibly be derived from the same principle which entitles the King to other personal property of the bishop upon his death. It will be recollected that the King is entitled, according to Sir *Edward Coke* (d), to six things—the bishop's best horse or palfrey, with his furniture—his cloak or gown and tippet—his cup and cover—his basin and ewer—his

(a) Co. Litt. 90. a., 388. a.

(b) Co. Litt. 90. a.

(c) Co. Litt. 388. a.

(d) 2 Inst. 491.

gold ring—and, lastly, his *muta canina*, his mew, or kennel of hounds; which, says the record quoted by Sir *Edward Coke, ad Dominum Regem ratione prerogativæ suæ spectant et pertinent*. [A similar practice obtained in the *Anglo-Saxon Church*. As soon as an episcopal church became vacant, the ring and crozier, the emblems of episcopal jurisdiction, were carried to the King by a deputation of the chapter, and returned by him to the person whom they had chosen, with a letter by which the civil officers were ordered to maintain him in the possession of the lands belonging to his church. *Inguif.* pp. 32, 39, 63. A letter written by *Edward the Confessor* on one of these occasions is preserved in the *History of Ely*, p. 512.] The origin of the King's right to these chattels is not very clearly ascertained. *Coke* says that it was not any mortuary, but was given to the King as a fine, that the bishop might have power to make wills and grant probates and administrations. *Blackstone*, on the other hand (a), thinks that it was in the nature of a mortuary, which he calls a sort of ecclesiastical heriot; a term which imports a duty due to a superior either by service or custom. Whether it is to be referred to the cause assigned by the one or the other of these learned persons, it is clear, that, in cases to which the King's right did not extend, the chattels would pass to the executor.

To shew that the right of presentation is not distinct from the advowson, the following case is relied on in *Fitzherbert* (b). "If the King have an advowson in fee which voids, and, during the avoidance, the King *granteth* the advowson in fee, the King shall not present to this avoidance." Now, it will be observed that this proposition turns altogether upon the effect of the King's *grant*; and that a *chose in action* is grantable by the King, which it is not by a subject. That the proposition is founded on

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1771
The papers within
the brackets formed no
part of the judgment
but were intended to be
inserted as a note by
the Reporter.

(a) 2 Bl. Com. 245.

(b) Fitz. Nat. Brev. 33.

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the operation of the King's *grant*, may in some degree be inferred from what follows, viz. "But, if the King have an advowson by reason of the temporalities of a bishop, and, during the avoidance, the King *restores* the bishop the temporalities, yet he (the King) shall present to the advowson, and not the bishop, for this avoidance." In this case, the *restoration* of the temporalities of which the advowson is, part, does not carry with it the presentation which has fallen while the temporalities were in the King's hands, though it is said, in the former part of the passage, that a *grant* of the advowson would have that effect. A difference, therefore, is taken between a *grant* of an advowson by the King, and a *restoration* of the temporalities including the advowson. Moreover, it must be observed that Sir *Matthew Hale*, in his notes on *Fisher's* *Natura Brevium*, does not implicitly adopt the position in the text, but cites some authorities to show that, even, the *grant* of an advowson will not carry the presentation, unless there are special words of the avoidance in the grant. His note is as follows—"Vide *contra*, except there are special words of the avoidance, 16 H. 7, 8.—*Dyer*, 282, 302 a, 348 a. And see *accordant*, 18 Ed. 3, 58 a. But contrary in the case of a common person. 11 H. 4, 54 b. And an avoidance fallen is not *grantable* by a common person. *Dyer*, 283, 348.—*Stamf. Petrog.* 44.—46 Ed. 3, Grants, 50.—18 Ed. 3, 22, &c. in margin." *Watson* agrees with the suggestion of *Hale*; for, he says—"If, when a church is void, the King *grants* a manor, with all advowsons appendant, the void turn does not pass thereby, unless he also mention it in his grant (a)." And another case arising upon a grant of the King is stated in *Rolle's Abridgment* (b), from which the distinct nature of the presentation strongly appears—"If the King has an advowson by reason of a wardship, and he *grants* to ano-

(a) *Watson*, ch. 10.

(b) 2 *Roll. Abr.* 34.

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ther during the minority of the ward, and after the church becomes void, and continues so until the ward attain his full age, whereby the interest of the grantee determines, yet the grantee shall have the presentation, and not the King." This case is analogous to that of the lessee of an advowson, who, his interest having expired, is entitled to present to a church which had become void during the term. But for the grant, the King would be entitled in preference to the heir, and by virtue of the grant, the grantee is entitled in preference both to the King and the heir.

I will trouble your lordships with only one more instance (which occurred in the reign of Queen *Elizabeth*) to shew how clearly the right of presenting to a void church was considered as distinct from the advowson itself. If an advowson comes to the Queen for forfeiture by outlawry, and then the church becomes void, and the Queen presents, and then the outlawry is reversed for error, yet the Queen shall enjoy the presentment, because it came to the Queen as a profit of the advowson; but, if the church be void at the time of the outlawry, and the presentment be forfeited as a chattel principal and distinct, and then the outlawry is reversed, the party shall have restitution of the presentment. *Beverley and Cornwall's case* (a). Here, the Queen's right to the presentment as a profit of the advowson while in her hands, is asserted in the first part of the case; and the subject's right to restitution of the presentment upon an avoidance before the outlawry, is acknowledged in the latter part, because such right of presentment became a distinct chattel before the outlawry.

2. I am next to consider the question with reference to the person (a prebendary of a cathedral church) to whom the right of presentation accrued.

(a) Moore, 269.

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A prebendary is a sole corporation existing by charter of foundation, or by prescription which presumes a charter; and all the possessions of the prebend are derived either from the endowment of the founder or of subsequent benefactors. The right of presentation to a parish church must, therefore, have been derived mediately or immediately from the original patron of the living, who as such was seised of a temporal estate in the advowson. The nature and incidents of that estate could not be changed by its transfer to any particular person or body politic.

What the heir of a natural person cannot take, will not go to the successor of a sole corporation; for, as it is said in *Fulwood's case* (a), succession in a body politic is inheritance in the case of a body private. And therefore, in the case of a sole corporation or body politic, be it created by charter or prescription, as bishop, parson, vicar, master of an hospital, &c., no chattel, either in action or possession, shall go in succession no more than the heir of a private man can have them; but the executors or administrators of the bishop, parson, &c., shall have them. On this ground it is that a bishop, parson, &c., or any sole corporation which are bodies politic by prescription, can take a recognizance or obligation but only in their private and not in their public capacity. If, indeed, there be a custom that the successor of any corporation sole, as the chamberlain of *London*, shall have a recognizance acknowledged to his predecessor, he shall take it; because the same custom which made him a corporation in succession for the particular purpose, has enabled his successor to take recognizances, obligations, &c., made to his predecessor; in the absence of which he would not be entitled to do so. The exception founded on custom, in the instance of the chamberlain of *London*, establishes the general rule in those cases in which custom cannot be relied

on. And, according to Sir *Edward Coke*, in the case of bodies politic by prescription, such as bishops, parsons &c. (in which " &c." is manifestly included prebendaries), there wants such custom to take a chattel (or, as I apprehend, any interest distinct from the inheritance,) in their politic or corporate capacity. Independently, however, of this negative argument arising from the incapacity of the successor, I am led to infer from analogy that the personal right of the prebendary, existing at the time when the church becomes void, is to be preferred to that of his successor.

The appendancy of an advowson to a manor is analogous to its union with a prebend; yet, if the church be void, and the lord of the manor die leaving the church vacant, his executor, and not his heir, shall present. The title of a husband in right of his wife endowed of an advowson by a former husband, is not unlike the seisin of a prebendary in right of his prebend; yet, if the church become void during the coverture, and the second husband survive, he, and not the heir of the first husband, shall present: and, if the second husband die before exercising his right, his executor would be entitled to stand in his place. The ecclesiastical character of the prebendary does not appear to me to make any material difference between this case and that of any other corporation sole. A prebendary, before the statute 13 & 14 *Car. 2*, c. 4, might have been a layman; a prebendary, as such, has no cure of souls; and was not obliged, by the 13 *Eliz.* c. 12, to subscribe or read the thirty-nine articles (a). Nor would the ecclesiastical character, supposing the prebendary always to have been a priest in holy orders, necessarily entitle his successor to a right of nomination or presenting to a benefice accrued to him in right of his prebend.

The transmission of an archbishop's options to his per-

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sonal representatives, and the right to dispose of them by will, is a strong instance to shew that a personal right, though arising from the ecclesiastical character, does not pass to the successor. Another strong instance is that mentioned by *Fitzherbert* in his *Natura Brevium* (a) —“If a vicarage happens void, and, before the parson presents, he is made a bishop, &c., yet he shall present unto this vicarage, because it was a chattel veated in him.” In this instance, the individual to whom the right accrued as parson, after having vacated the rectory by acceptance of other preferment, is allowed to present the vicar in preference to the successor in the rectory. Whether the case here put was founded upon any actual decision or only *Fitzherbert's* understanding of the law prevailing in his own time, it has the sanction of his great name, and must be deemed of high authority. One distinction, indeed, is recognized between lay and ecclesiastical patrons, in respect to the right to vary a clerk presented. If an ecclesiastical patron once present a clerk and then vary his presentation by presenting another, the bishop is not bound to receive either. Whereas, if a lay patron, having presented one clerk, afterwards present another, the bishop cannot absolutely refuse to institute, but may make his choice. The ground of this distinction is, that the ecclesiastical patron has not the same excuse as the lay patron for omitting to ascertain the sufficiency of the clerk first presented (b). But this distinction has no bearing on the question of succession to the right of presentation.

It has been urged at your lordships' bar, that, where a judicial officer entitled to appoint to some office dies without having made an appointment, the successor in the office shall appoint. The first answer to this case is, that such right of appointment is not property of any kind; and the next, that the same law, whether old or new, which

(a) Fitz. Nat. Brev. 34 N.

(b) Keilwey, 154.

has established the superior office, has regulated the right of appointment: in which respect the case resembles that of the chamberlain of *London*, the principle of which is, that the law which regulates the right of succession is co-eval with the establishment of the office.

3. It now only remains for me, in the third place, to consider your lordships' question with reference to the personal representatives of the deceased prebendary.

The right of the personal representatives of a natural person, where a right of presenting has accrued, was not disputed in argument. It was admitted to be too firmly established upon authority to be now called in question: but it was contended to be an exception from the general rule of law, which ought not to be extended to a new case, the exception itself, though established, being, as it was said, inconvenient and founded on a vicious principle.

I do not propose to offer to your lordships any observation upon the convenience or inconvenience of the existing law, by which the personal representative in ordinary cases is preferred to the owner of the advowson; but, if the view which I have taken of the right be at all correct, the law which prefers the personal representative is the general rule, and it lies on those who deny its application to the administrator of a deceased prebendary, to establish a ground of exception.

It may be admitted that the right of such administrator has never been the precise subject of any judicial decision. But little is to be inferred from that circumstance either on one side or the other. If any argument is to be built upon the absence of litigation upon the subject, I should rather conclude that the general rule had prevailed, than that an exception to it had been admitted without dispute. There can be no doubt that, generally speaking, the executor of a prebendary, as well as every other ecclesiastical corporation sole, takes the personal rights of his testator, whether in possession or in action,

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which accrued to the deceased in right of his prebend; such as the produce of the prebendal lands actually sowed; or rent become due before the death of the prebendary. So, a ward, relief, heriot, &c., accruing from the prebendal lands, would pass as chattels to the executor; and, on the other hand, the successor does not take any such rights or interests as are less than freehold. Even if a bond be expressly given to a corporation sole (as, the Dean of St. Paul's), and to his successors, the successor shall not sue upon it, but the executor (a). It is urged, however, that the right of presentation to a vacant church is not a matter of profit, and that the personal representative of the deceased prebendary ought not to take it, because it would not be an asset. But the same argument applies to the personal representative of a natural person, in which case their title is admitted to be unimpeachable. If the right of presentation be not part of the freehold, it cannot be exercised by the successor. By whom, then, should it be exercised; but by the person who represents the personal interests of the deceased? The title of a personal representative is not confined to those things which become assets in his hands. All the personal estate of the deceased, whether held for his own benefit or for that of others, passes to his executor or administrator. Terms for years producing no benefit, covenants and obligations for the benefit of strangers, vest in the personal representative. If the patron be disturbed in presenting to a vacant church, and die, his executor, and not his heir, must bring the writ of *quare impedit*. It can scarcely be argued that the successor of a deceased prebendary who was disturbed in his life-time, could maintain such a writ; and, if not, who but the executor could maintain it? and who is to have the writ to the bishop? Moreover, it is to be recollected, that, in

(a) 20 Ed. 4—2 Bro. Abr. tit. "Corporations," 60.

such an action, damages are recoverable, and that such damages would be assets. In *Smallwood v. The Bishop of Coventry* (a), it was expressly held by the justices that this action was within the equity of the statute of 4 Edw. 3; for the presentment is a chattel that should go to the executors if the disturbance had not been; and for a disturbance in their own time they shall recover damages to the use of the testator; by the same reason, for a disturbance in the time of their testator, they shall recover damages by the equity of the statute 4 Edward 3. And, according to the report of the same case in *Saville* (b), it was held, with reference to the objection that the presentment would not be assets, that every thing which the law gives by execution should be said to be valuable, and consequently assets; that, by recovering in *quare impedit*, the damages would be assets; and so, as the advowson is assets in the heir, the presentment shall be in the executor. Will it be said that such assets belong to the successor of a prebendary, or that he, rather than the executor, is to sue for them for the benefit of the deceased's personal estate?

It has been objected in argument, against the right of the personal representative, that he cannot present in right of the prebend; yet that he ought to present in that right in which the deceased prebendary must have presented. But the same difficulty, if it be one, would apply to the case of a husband who, though not tenant by the curtesy, presents after his wife's death, in respect of an advowson vested in the wife, to a living becoming vacant during the coverture; and also to the case mentioned by *Fitzherbert*, of a parson to whom a right of presenting to a vicarage has accrued in right of his church, and who presents a vicar after having vacated his rectory by promotion. In

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(a) Cro. Eliz. 207.

(b) Page 118.

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both these cases, the right which accrued *alieno jure* is asserted by the presentor as a personal right vested in the individual to whom it accrued,

My lords, the observations which I have humbly submitted to your lordships have been confined to the case of a presentative advowson; the object of your lordships' question being in terms a right of presentation. The case of a donative advowson, in which there is no presentation to the bishop, stands altogether upon different ground; not forming, as I conceive, any exception to the general rule which has been mentioned, but being of a nature to which the rule is not applicable. The principle of the rule which gives the right of presenting to the executor, is, that the right which accrued to the testator as patron is become distinct from the advowson. It belongs to the patron for a limited time only, which time is independent of his interest in the advowson. If not exercised within six months, it passes as a separate and distinct interest to the bishop; and, if not exercised by the bishop within six months more, it passes in like manner to the King: neither the bishop nor the King having any interest in the advowson. In the case of a donative, the right of presenting is subject to no limitation. Though the patron forbear to fill the church for any length of time, his right is not lost; it does not pass from him to the bishop, or to the King, or to any other person: and, if he never fill the church at all, the common law has made no regular provision for compelling him to do so. So different is the right of the patron of a donative, from that of a presentative advowson, that, even during the incumbency, the sole right of visitation and correction continues in the patron, independent of the jurisdiction of the ordinary. The patron alone can deprive the incumbent; and it is to him that resignation must be made.

It is unnecessary here to consider whether, by the spi-

ritual court or by any other means the owner of a donative might be obliged to supply a minister for the service of the church, upon the ground of his having dedicated the church to the public for spiritual purposes; for, admitting such obligation to lie upon the patron, yet during the vacancy of a donative, either by death, resignation, or otherwise, the freehold of the church, of the glebe, and of the tithes, reverts to the patron, and remains in him till by a new gift he confers it upon a new incumbent; and it would, therefore, be inconsistent with this title of the patron, that any other person should have a right to divest his freehold by collation.

For these reasons, my lords, I am humbly of opinion, that, where an advowson belongs to a prebendary in right of his prebend, and the church becomes vacant, and the prebendary dies without having presented, the right of presentation belongs to his personal representative.

Mr. Baron BOLLAND.—Your lordships have proposed as a question for the opinion of the Judges, whether, if an advowson belongs to a prebendary in right of his prebend, and the church becomes vacant, and the prebendary dies without having presented, the right of presenting belongs to his personal representative.

It is highly probable that the state of facts out of which this question arises has in very many instances existed, and it is remarkable that no light is thrown upon the subject by any decision at law, nor by any practice of the church upon a presentation to a benefice under circumstances precisely similar to the present. If any such decision exist, it has escaped the industry of the experienced counsel who argued this case in the Courts below and at the bar of this House, and the researches of the learned Judges of those Courts, whose inquiries were so sedulously directed to the discovery of some authority upon which their judgment might be founded. It is to princi-

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ple, therefore, and to cases analogous to the present (if any can be found), that the attention is to be turned, in order to arrive at a satisfactory conclusion.

In pursuing this inquiry, I do not mean to dispute that, by the law as it stands, if a presentative church the advowson of which belongs to a layman become vacant, and the lay patron die without presenting, his executor shall present, and not his heir or devisee, or the next owner of the advowson, it being considered that the next turn is a chattel: though this seems to have been doubted in the case of *The Queen v. The Archbishop of Canterbury, Fane, and Hudson (a)*, and the Court left it undecided. The distinction I shall endeavour to make will be that the right of the owner of an advowson *does* depend (though the contrary is contended for on the part of the defendant in error), upon the character in which he holds; and that, as the deceased was seised of and in the prebend of *South Grantham*, with its appurtenances, to which prebend the advowson of the rectory of the parish church of *Welby* with its appurtenances belonged, in his demesne as of fee in right of the said prebend, the right of presentation to the church when it should become vacant arose out of his office of prebendary, was a spiritual trust to be executed for the support of, and for the promotion of the welfare of the established religion, and that to him, and to him alone, was confided the choice and appointment of an incumbent.

It appears from history, that, for six or seven centuries, the *parochia* was the diocese or episcopal district; there was the residence of the bishop and his clergy at the cathedral church; all tithes, offerings, and ecclesiastical profits belonged to the bishop and his clergy, for their support, for the repairs and ornaments of the church, and for other works of piety and charity. Such community

(a) 1 Leonard, 201—4 Leonard, 109.

and collegiate life of the bishop and his clergy was the practice of the *British*, and was afterwards adopted by the *Saxon Church* (a). Many causes contributed to the existence of parochial churches. In some places, the liberality of the inhabitants raised them, and, by supplying preachers with houses, induced them to settle and become the pastors. Kings founded free chapels for the purposes of worship for their Court and retinue. The bishops, too, to plant and encourage christianity amongst the people, built churches. But the great source from whence the increase of the number of buildings for divine worship arose, was, the piety of the great lords, who, having large possessions and territories, founded churches for the use of their families and tenants within their respective domains: and hence, it seems, a title to patronage in laymen, first sprung; hence the boundaries of parishes became commensurate with the extent of manors; hence the several portions of the same church were divided according to the separate interests of the several lords. But, although, for the purpose and in the hope of more firmly establishing religion, and more widely extending its divine influence, these changes in the constitution and management of the Church were permitted, the right of the bishop, either in respect of spirituals or temporals, was not invaded. He still had the cure of souls, and a title to all the ecclesiastical revenues within his whole diocese; by

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(a) During the *Anglo-Saxon* dynasty, the revenues of each particular church or monastic establishment formed a general fund, which, according to a constitution of Pope *Gregory* the Great, was to be divided into four equal portions (*Bede*, b. 1, c. 27.): of these one was allotted to the bishop for the support of his dignity, another was reserved for the mainte-

nance of the clergy, a third furnished the repairs of the church and the ornaments of religious worship, and the last was devoted to the duties of charity and hospitality—it formed a sacred fund, to which every man who suffered under the pressure of want or infirmity was exhorted to apply, without the fear of infamy or the danger of a repulse.

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his authority and consent priests were ordained as assistants given to him; no church could be used for public worship till consecrated by him; no priest could officiate there without his delegation.

From the causes I have above stated, the privilege of nominating fit persons to officiate in churches which the piety and liberality of private persons had founded or endowed was given: and the bishops were content in such cases to forego the privilege of appointing the ministers who were to perform the duties in such churches. This power was conceded to the founders or benefactors *ratione foundationis* where they were founders, *ratione donationis* where they endowed the churches, and *ratione fundi* where they gave the soil upon which they were built; the bishops reserving only the power of deciding upon the fitness of the persons nominated (a). In process of time this practice became the law of the Church. The Church having made these concessions, and having thus parted with the right of presenting, it became a matter of indifference to the bishops whether, upon the death of the lay owner of an advowson during the vacancy of the church belonging to it, the right that the patron, had he lived, would have exercised should go to his heir or should belong to his executor; the Church, therefore, left that question to the Courts of law to determine; and I am bound to admit, that, in such cases, the claim of the executor is established; but I cannot apply that rule to the case in question, because the advowson of which the late prebendary of *South Grantham* was seised was given to him as a member of the church of *Salisbury*, was appendant to an ecclesiastical dignity, and is not to be governed by the same law as is applicable to advowsons in lay hands.

If I am wrong in taking this view of the question, the error arises from my considering the right of the executor

(a) Co. Litt. 119. b.

of a lay patron to be an exception from the rule which governs property of this description in the hands of the Church; as there appears to be a manifest distinction between lay and spiritual property.

In the note upon the tenth section of *Littleton* (a), it is said—"Of an advowson, wherein a man hath as absolute ownership and property as he hath in lands and rents, yet he shall not plead that he is seised *in dominico suo ut de feodo*, because that inheritance, avowising not *de domo*, cannot either serve for the sustentation of him and his household, nor can any thing be received for the same for defraying the charges, and therefore he cannot say that he is seised therein *in dominico suo de feodo*." In the section of *Littleton* upon which this is a commentary, the author is treating of an advowson in lay hands: and these authorities are adduced by *Gibson*, in his *Codex* (b), in speaking of spiritual property, to illustrate the difference he points out. In the pleadings in the present case, the prebendary is alleged to be seised of the advowson in his demesne as of fee; and why is it so pleaded? The answer is, it is not a lay title, but that, to use the language of Lord *Coke*, it savours *de domo*, and may be made serviceable for the sustentation of him as a spiritual person, and his household. The case of *London v. The Chapter of the Collegiate Church of Southwark* (c), is a further proof of the distinction I have taken between lay and spiritual property.

I shall next call the attention of your lordships to the ecclesiastical character of the officer in whom, till his death, it cannot be denied the right of presentation was vested, to the object of the founder of the prebend, and to the nature of the property with which he endowed it.

A prebend, as defined by Dr. *Cowel*, is, the portion

(a) 1 Inst. 17. b.

(b) Page 757.

(c) Hobart, 303.

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every member or canon of a cathedral church receiveth in the right of his place for his maintenance; so, *canonius portio* is properly used for that share which every canon or prebendary receiveth out of the common stock of the church; and *prebenda* is a several benefice arising from some temporal land or church appropriated towards the maintenance of a clerk or member of a collegiate church, and is commonly named of the place where the profit groweth. And these prebends be either simple or with dignity: simple prebends be those which have no more than the revenue towards their maintenance; prebends with dignity are such as have jurisdiction annexed to them, according to the divers orders in every church.

Of the object of the founders of prebends there cannot be a doubt; it was to provide for the maintenance and support of the prebendaries; and it cannot be supposed that it was the intention of any founder that the emoluments of the prebend should be appropriated beyond the life of the party in possession. I shall not stop to inquire whether this charitable intention of founders has not been in a great measure defeated; but I shall confine myself to the consideration of whether the particular right contended for by the administratrix in this case is founded upon any decision, or can be supported upon principle. It is admitted, on all hands, that no authority is to be found on the subject; let us then look to the character of the person under whom the right to present to the church of *Welby* is claimed by the defendant in error. He was an ecclesiastic; as a layman he could not at this day have enjoyed the dignity: the office was conferred on him by the Church; its emoluments and profits were intended by the founder for his support; to him was confided the sacred trust of providing a proper minister for the church appendant to his prebend. Looking back to the times when similar benefactions were bestowed upon the Church, no one can hesitate to be con-

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vinted that the founder of the prebend of *South Grantham* intended the prebendary to become incumbent of the church, or at least that he should (unless provided for in such a manner as to render the living of *Welby* untenable) have the power of being so. The selection of the prebendary by the bishop was a voucher for his piety, and a sanction and authority to him; that, in presenting himself or any other clerk, the true interests of religion would be promoted. Can it be contended that the trust can be carried farther? To do so is to put into the hands of a stranger to the church a trust the execution of which was confided to a member of its own body; is to divert the course of the founder's bounty into a different channel from that in which he intended it should flow, and to establish a precedent by which the best interests of the Church (I admit the instances would probably be few,) might be affected:

If I am correct in considering an advowson in the hands of a prebendary in right of his prebend as a spiritual trust which is vested in him *jure ecclesie*, it should be inquired whether such a trust can be transferred to another, or whether it survives; and will go to the representative of the deceased person in whom it was placed. I find in *Colt and Another v. The Bishop of Coventry and Lichfield* (a), it is said, that, "if a lapse incur, and then the ordinary die, the King shall present, and not the executors of the ordinary, for it is rather an administration than an interest" (b). The case of *Merton College, Oxford* (c), is doubtful whether to the King or to the metropolitan. So again (d)—"A lapse, as I have said, is an act and office of trust reposed by law in the ordinary, metropolitan, and lastly in the King, the end of which trust is to provide the church with a rector in default of a patron, and yet as for

(a) Hobart, 154.

(c) Dyer, 87.

(b) Fitz. Nat. Brev. 34 G.—25
Edw. 3, 24.

(d) Hobart, 154.

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him and to his behoof: and therefore, as he cannot transfer his trust to another, so cannot he divert the thing where-with he is trusted to any other purpose." The reason given by the learned Judge, why the presentation does not go to the executor of the ordinary, *viz.* that it is an administration rather than an interest, appears to me mainly to fortify the position for which I am contending.

I cannot fail also to pray in aid the weight that is to be derived from the further consideration of the legal character of a prebendary. He is an ecclesiastical sole corporation, and, as such, he can have no heir, no personal representative. To his natural heir his prebendal rights cannot pass; nor can they vest in his personal representative: but the right of presenting to the vacant church must remain unsevered and in abeyance till the appointment of a successor.

In treating this matter, I have not commented upon, nor attempted to remove the effect of those arguments that have been drawn from several of the authorities that have been relied upon in support of the claim of the defendant in error, because, as they have proceeded upon lay patronage, they have, in the view I have taken of the subject, no bearing upon the question.

From what I have said, your lordships will have collected that the opinion to which I have come is, that, if an advowson belongs to a prebendary in right of his prebend, and the church becomes vacant, and the prebendary dies without having presented, the right of presenting does not belong to the personal representative of the deceased prebendary.

Mr. Justice J. PARKE.—To the question which your lordships have been pleased to refer to the Judges, I answer that, in my opinion, the right of presentation belongs to the personal representative of the deceased prebendary.

The precise facts stated by your lordships have never,

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as far as we can learn; been adjudicated upon in any Court; nor is there to be found any opinion upon them of any of our Judges, or of those antient text writers to whom we look up as authorities. The case, therefore, is in some sense new, as are many others which continually occur; but we have no right to consider it, because it is new, as one for which the law has not provided at all: and because it has not yet been decided, we are to decide it for ourselves, according to our own judgment of what is just and expedient. Our common law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and, for the sake of attaining uniformity, consistency, and certainty, we must apply those rules where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science.

I propose, therefore, to inquire, by reference to those sources from which we usually derive them, what the rules and maxims of the common law upon the subject are; and it will be found that there is little difficulty in the inquiry, and none, as it seems to me, in their application to the facts under consideration.

The decision of the present case depends upon two propositions, both of which appear to me to be established by authority, and neither of which can be shewn to be unreasonable or inconvenient—*first*, that, in every presentative benefice, the void turn is a personal right or interest which is disannexed from the estate in the advowson, and

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vested in the person of the individual to whom the advowson then belongs—*secondly*, that, whether valuable in a pecuniary point of view or not, all personal rights and interests of the nature of property, and which are not extinguished by death (with some exceptions, which are easily explained, and which have no bearing upon the present case) vest, on the death of the owner, in his personal representatives.

1. The first of these two propositions, I say, will be found to be supported by authority; for, in every case which is reported, and in every book in which the subject has been treated of or mentioned, as far as I have been able to discover, the void turn, or right of presenting to a vacant *presentative* benefice, is either expressly stated to be a personal right or interest, under a considerable variety of descriptions, or the cases mentioned are capable of a satisfactory explanation upon that supposition only.

It is true that the great majority of the authorities to which I refer relate to benefices in lay hands, but *all* do not; and there is no one case, text book, or *dictum*, of which I am aware, in which any intimation is conveyed that there is *any exception* to this general rule. Surely it is impossible to argue, with such a constant, uniform, and unvarying course of precedent on one side in all cases in which the subject has been in question, and in the absence of all authority for such an anomaly on the other, that the case of an advowson in spiritual hands is an exception to the general rule. And, if the absence of authority were not sufficient, it seems impossible to shew in what way the exception could have arisen.

I have said that this rule exists in all *presentative* benefices, and I confine it to these; for, *donatives* are a very different species of property, and are governed by different rules. This subject is most clearly explained, and all the authorities referred to, in the very learned judgment of my

brother *Littledale* in the Court below (a); and it is enough to say the result is, that, in *donatives*, the complete dominion over the vacant benefice and the freehold in it remains in the patron, together with the right to take the intermediate profits, until it is again granted out by him to a new incumbent in the nature of a new investiture. This freehold, in the case of the death of the patron during a vacancy, of course passes to the heir.

I do not propose to occupy your lordships' time by citing all the authorities to prove that the void turn of a presentative benefice is a personal right or interest. They have been all referred to in the argument at your lordships' bar, and in those in the Courts below. In some cases, this interest is called "a chose in action"—*Leach v. Babington* (b). In some "a chattel," as by Mr. Justice *Periam*; in *The Queen's, Fane's*, and *The Archbishop of Canterbury's* case (c). In others, as in *Fitzherbert* (d), "a chattel vested;" a "personal chattel" (e); a chattel vested and severed from the manor" (f). In one it is called "a personal thing annexed to the person of him who was patron in expectancy at the time of the vacancy;" also "a thing in right, power, and authority;" and also "a chose in action, and in effect the fruit and execution of the advowson, and not any advowson" (g). In *Leonard* (h), a power to present, and an authority annexed to the person." In *Digby v. Fitch* (i), Mr. Justice *Warburton* said—"The presentment is the possession in *quare impedit*; as, in rent, the receiving; in common, the taking of the profits." In *Brokseby v. Wickham* (k), it is also compared to rent.

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(a) 7 Barn. & Cress. 145; S. C. 9 Dow. & Ry. 812.
(b) Cro. Eliz. 811.
(c) 4 Leonard, 109.
(d) Fitz. Nat. Brev. "Quare Impedit," 34 N.—3 Keble, 152.
(e) Vin. Abr. tit. "Executor,"

(Z. 2.) pl. 4, n.

(f) Fitz. Nat. Brev. 33 P.

(g) By six Justices—*Stephens v. Wall, Dyer*, 283 a.

(h) 3 Leonard, 256.

(i) Brownl. & Gould. 167.

(k) 1 Leonard, 167.

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And this analogy will be found to be the most perfect: the advowson is the estate, which descends, may be conveyed and limited, and escheats as such; the presentation is the mode of enjoyment, the profit or rent of the estate, and, like the rent or profit, belongs to the owner of the estate at the time it accrues, in the nature of a personal chattel, distinct and severed from the inheritance; it belongs to him, not as owner, but as an individual.

These authorities, in which the right of presenting on a void turn is treated as a personal right, are not confined to the case of passing to the executor in the event of the patron's death during vacancy. There are many others in which it is so treated. A termor in the advowson has a right to present, though after the term has expired, to a vacancy which happened during the term (*a*); and he would be equally entitled to the rents in arrear of an estate granted for the same term. A husband is entitled to present after his wife's death, on an avoidance during his wife's life-time, of a church of which she had the advowson (*b*); as he would also be entitled to the arrears of rent of his wife's estate. It is incapable of being assigned (*c*), or released by one joint tenant to another (*d*), as arrearages of rent are. If the patron be outlawed in trespass, the church being void, the King is entitled, as to the other goods and chattels of the outlaw, and as he would be to the rents of his lands (*e*). All these are cases of advowsons in lay hands; but a void turn is treated in one case as a personal right, disannexed from the advowson, when in spiritual hands. In *Fitzherbert* (*f*) it is said, that, if a vicarage happen void, and, before the parson present, he is made a bishop, &c., yet he shall present unto this vicarage, *for it*

(*a*) Fitz. Nat. Brev. "Quare impedit," 33 A.—Brooke, "Presentation al' Eglise," 22.

(*b*) Co. Litt. 120. a.—Brooke, "Presentation al' Eglise," pl. 22.

(*c*) Dyer, 288 b.

(*d*) 1 Leonard, 167.

(*e*) Brooke, "Presentation al' Eglise," 22.—Fitz. Nat. Brev. 34 Q.

(*f*) Fitz. Nat. Brev. 34 N.

~~was a chattel vested in him.~~ All the authorities which I have cited are uniform (and many others might be adduced) to shew that the right of presentation is a personal right, disconnected from the estate of the advowson, and belongs to the person of the owner; and the last applies to the case of a spiritual person, and is in point.

But, on the part of the successor, it is argued, so far as his case is put upon the ground of authority, that the last case is single and unsupported; and that all the others are anomalies; that, in truth, the general rule is, that the void turn continues part of the advowson; that these exceptions have been introduced in all cases of lay patronage without any reason at all, though they have been too firmly established by authority to be now disturbed: but that the *general rule* still continues, and ought to be maintained, in the case of spiritual advowsons. Of course, the burthen of proving the existence of this rule lies on those who assert it; but the singularity of this argument which was urged at your lordships' bar is, that, whilst it treats all the cases in the reports and books as anomalies and exceptions to a supposed general rule, without the least authority for stating that they are exceptions and anomalies, it asserts the general rule, as will be found, without any authority for it; for, there is no one case or *dictum* cited which makes any mention of such a general rule. But it is contended, that it must be *implied* that there is such a rule, from four cases, which lead to the inference that the next turn continues part of the advowson. One was, where the incumbent was also patron, and died seised in fee of the advowson—the heir was held entitled to present; and it was said that this must be because the turn continued a part of the advowson. *Holt v. The Bishop of Winchester* (a). But this case was decided, not on the ground of the next turn continuing parcel of the advowson, but expressly on the ground that the descent to

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(a) 3 Levinz, 47.

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the heir, and the fall of the avoidance to the executor, happened in one instant, and that the elder right should be preferred. The general nature of the interest which arises on an avoidance was distinctly admitted, and the right of the heir put upon a ground which is perfectly consistent with it.

Two other cases from which this inference was raised were those referred to by Lord Coke (a). A bishop dies, a church being vacant in his life, and after his decease the King shall present, and not the executor or administrator. So also, in the case of the death of a tenant by knight's service *in capite*, with an advowson appendant which has become void in his life, his heir within age, the King presents, and not the executor or administrator; and this is said to be another proof that the void turn is still a part of the advowson. But, though the King omit to present, till he restore to the bishop his temporalities, or till the heir be of age and sue his livery and hath it, the King still has the right to present: and this shews that in neither case the void turn remains parcel of the advowson and belongs to the person who is the owner of it. For both these propositions *Fitzherbert* (b) is an authority. Besides, it is said by Lord Coke (c), that, if the land be holden of a common person, in that case the executor shall present; but, if the void turn were still part of the advowson, why should not a common person, as well as the King, who both take the advowson, exercise this right? It is quite clear, therefore, that neither of these cases can be explained by the supposed rule. We must look for another explanation. Both are clearly referable to the King's prerogative, which entitles him, in these special cases, to this personal interest. It should be observed also, that the two cases in *Rolle's Abridgment* (d), and

(a) Co. Litt. 388. a.

(b) Fitz. Nat. Brev. 33 N. O.

(c) Co. Litt. 388. a.

(d) Tit. "Presentment al'Es-
 glize," (C.) pl. 4.

Brooke's Abridgment (a), which state that the King is entitled; both state that the bishop's executors are not; which shews that these great lawyers thought the void turn was disannexed, and that the successor, at all events, had no right whatever.

A fourth case from which the inference of this continuance of the void turn as part of the advowson was deduced, was that of a conveyance by the Crown of an advowson whilst the church was void, which, according to *Fitzherbert* (b), passes the void turn. Admitting that authority to be correct (and it is doubtful, from what is said upon this subject in *Dyer*, 328 b.), it is a question only as to the effect of the King's grant, and never could have arisen, unless the void turn had been severed and distinct from the advowson. The case, in truth, amounts to no more than this, that the grant of an advowson, which involves in it every present and future right of presentation, passes in the case of the Crown the next presentation to a void living, which the Crown can grant (c), though, in the case of a subject, it would not; for, a subject cannot grant over such a personal right.

None of these four cases, therefore, which are relied upon as proofs of the existence of this supposed rule (and there are no others), in reality prove it at all, and all are capable of being satisfactorily explained upon another supposition. There is, therefore, as it appears to me, a great body of authority in favor of the position that the void turn is a personal right in all cases; and, when the cases are investigated, a total absence of authority to the contrary.

If it be conceded that this interest is of a personal nature and dissevered from the advowson in all cases, it must be contended, that, in the case of a spiritual person, this per-

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(a) Tit. "Presentation al'Eglise," 10.

(b) Fitz. Nat. Brev. 33 N.

(c) *Dyer*, 283 a.

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sonal interest or chattel will go by succession. But that is a violation of the established rule that a corporation sole cannot take a chattel by succession, whether in possession or action—*Fullwood's case* (a); and no authority can be cited that this special chattel interest is an exception. I have shewn, therefore, that there is no authority for the alleged general rule that the void turn continues annexed to the advowson, and is not of a personal nature: and, if it be of a personal nature, there is not only no authority, but it is against the rules of law, that it should pass to a successor. Upon the hypothesis in favour of the successor, all the decided cases are anomalies; upon that made by the personal representatives, that the right of presenting is, in all cases, both of lay and spiritual patronage, a personal interest, we have an uniform and consistent system. As this right in lay hands is analogous to rent in the case of land, so it is when the advowson is in spiritual hands; and as a parson or prebendary who resigns, or his executor when he dies, is clearly entitled to arrearages of rent and profits which accrued before his resignation or death (b), so he or his personal representative ought to be entitled to the right of presenting which fell during the same period. Besides, if this anomalous principle is introduced on the ground of the spiritual character of the prebendary, what is to be said of it whilst the prebend was in lay hands? which it clearly might have been before the act of uniformity, according to the case of *Bland v. Maddox* (c). Is the void turn to be dissevered or not, according as the prebendary is a layman or an ecclesiastic?

It is said that this patronage is so annexed to this spiritual corporation as to be incapable of separation from it: but, not only is there no authority for this position, but many precedents are against it, in which bishops and other eccle-

(a) 4 Rep. 65.

D.—19 Hen. 6, 44.

(b) Fitz. Nat. Brev. 120 L., 122

(c) Cro. Elis. 79.

siastical corporations sole have granted away their right to laymen, which grants have been considered good against themselves. I need not refer your lordships to the authorities, farther than by saying that they are collected in the reported cases in the Courts below. And indeed I am at a loss to see in what way the alleged difference, if there be one, between the qualities of an advowson in lay hands and in those of a spiritual proprietor could have arisen. It is highly probable, to say the least of it, that all rectories were originally created in the hands of laymen, who received the patronage from the bishop in lieu of those lands which they granted on the foundation or endowment of a church: and, if this be so, what is there to raise the presumption, that, when they afterwards granted these advowsons to the church, they wished them to have new properties and qualities different from those they had in their own hands; or, if they did so wish, what power had they to communicate them? They could no more alter the rules of law, and make chattel interests be taken in succession by a corporation sole, than they could make the estate in a freehold descend to executors. Succession in a body politic is inheritance in a body private^(a); and no grantor can, however much he may wish it, limit his estate against the rules of law. And, supposing that there were instances in which a bishop or other ecclesiastical person, and not a layman, had originally founded or endowed a church out of the lands belonging to him in that character, and became the proprietor of the advowson, which he or his successor had granted to the prebendary, the same difficulty occurs in proving the intention of the donor, and a similar difficulty in carrying that intention into effect; and, if these difficulties are overcome, the alleged difference in the quality of lay and spiritual advowsons must at all events be confined to those very special cases, exclusive of all others.

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(a) *Fulkwood's case*, 4 Rep. 64 b.

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The next proposition which the authorities establish is, that all personal rights and interests, of the nature of property, and which are not extinguished by death, vest, on the decease of the owner (with some few exceptions), in his personal representatives. The executors or administrators are not constituted for the purpose of paying the debts of the deceased: their liability to those debts is a *consequence* of their representative character. *Littleton* (a) says that "executors represent the person of their testator." So, *Yelverton* (b) is to the same purpose. "He is in law the testator's assignee" (c). As to the estate committed to his trust, he may charge others and be charged himself, sue and be sued, as the testator himself might (d). Executors take, therefore, all the personal estate and interest of the testator, and are identified with him in respect to all personal property; but their obligation to pay debts is only to the extent of the value of those effects which are valuable. They have all the deceased's effects, but they are liable only for *assets*. It is a fallacy to suppose that they take nothing but what is valuable, and therefore do not take rights of presentation to void benefices; a fallacy which has led to the argument that all the cases in which a personal representative has taken a void turn, which certainly cannot be sold, are unreasonable anomalies. The 31 *Edw. 3*, c. 11, s. 1, puts administrators, who are the deputies of the ordinary, on the same footing as executors (e).

To this rule, that the personal representatives take all the personal rights of the deceased of the nature of property, there are some exceptions which the common law, in the case of private individuals, or the King's prerogative right, has established. Chattels touching the realty—deer

(a) Section 337.

(b) Page 103.

(c) *Wentw. Off. Ex.* 100.

(d) *Shep. Touch.* 401.

(e) *Vide Shep. Touch.* 401.

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in a park, fish in a pond, evidences of title, heir-looms, which go to the real representative, and the analogous case of the ornaments of a bishop's chapel, which pass to the successor—are of the former description: the right of the Crown to the void turn in the cases of the tenant *in capite* and the bishop, stated by Lord *Coke* (a), are instances of the latter: and it is to be observed that both those instances are put by him as exceptions to the general rule, “that chattels, as well real as personal, shall go to the executors or administrators.”

None of the excepted cases have any bearing upon this; there is no mention any where made of an exception of the right in question when in spiritual hands; and it would violate the rule of law as to succession by a corporation sole to chattels, if it did.

My lords, I must own that it appears to me to be quite clear, that, if this case is to be decided, as I conceive all similar cases ought to be, according to the rules deducible from former decisions and legal precedents and principles, there is no doubt as to the right of the personal representative of the prebendary to present to the void living. These rules cannot be shewn to be *contrary* to sound reason and just policy. We are not inquiring whether other rules might or might not have been more wise or reasonable, and whether the heir in the case of lay property, and the successor in that of spiritual property might or might not have been likely to exercise the right of presentation more beneficially to the public interests. If such an alteration is proper (and it is not my province to inquire whether it is or not), it must be made by the legislature. What ground has a Judge, says Lord Keeper *Henly*, to alter the law because he cannot approve the reasons that others have given, or may not be able to assign a satisfactory one himself? At present, the system is at all events uniform and

(a) Co. Litt. 388. a.

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consistent, and uniformity and consistency ought not to be lightly sacrificed.

The law of *England*, which has from the first treated advowsons as property, the founders or benefactors of churches having had the patronage granted to them as property for a valuable consideration; has not relied upon the *person or character* of the patron for the due exercise of the trust, but has adopted other securities for that important purpose. The incorrupt exercise of the trust is secured by the penalties against simony; and the selection of a fit clerk, by the examination of the ordinary. Subject to these provisions, it has left the patronage of churches to descend, be limited, and enjoyed like other real property.

For these reasons, I am of opinion that the right to present to the void turn passed to the personal representative of the deceased prebendary.

Mr. Justice GASELEE.—This, my lords, is not the first occasion on which my attention has been called to this question. Your lordships are aware, that, in the case out of which it arises, there have been conflicting judgments in the Courts of *Kings' Bench* and *Common Pleas*, and that full reports of these judgments are to be found in 11 *J. B. Moore*, 139—3 *Bingham* 228—7 *Barn. & Cress.* 113—and 9 *Dow. & Ryl.* 810. The case has been since very fully and ably argued at your lordships' bar; and in the course of the several discussions which it has undergone, I believe every authority that can be brought to bear upon the subject has been cited, and they are all mentioned in the reports I have alluded to. I shall therefore not trouble your lordships with going through them at length, but shall state as shortly as I can the grounds upon which I found my answer to your lordships' question in the affirmative.

It is extraordinary, that, although cases similar to the present must have happened, there are no traces of any

such having been made the subject of legal investigation; nor, upon the best inquiry I can make, have I been able to ascertain what the practice in such cases has been.

It is admitted that the general rule with respect to presentative livings is, that, if after a vacancy the patron of the advowson dies without having presented, the right of presentation to the vacant turn belongs to the personal representative, and not to the heir of the patron; and the reason given in the books for this is, that it is a fruit fallen, a chattel severed from the inheritance: or, in other words, that the moment a church becomes vacant, the turn is separated and disannexed from the advowson, and is vested in the person of the individual to whom the advowson at that instant belongs (a). And it is so far considered as disannexed from the inheritance, that the grant of an advowson during the vacancy does not carry the vacant turn.

Where the husband is tenant by the curtesy, and the church becomes void during his life, and he dies before it is filled up, yet the heir of the wife, who takes the advowson, shall not have the vacant turn, but the husband's executors. So, where the wife is seised of the advowson, and, the church being void, dies without having had issue, so that the husband is not tenant by the curtesy, yet the husband shall present to the vacant turn, and not the heir of the wife. Again, in the case of a termor; if a vacancy happens during the term, and he does not fill it up during the continuance of the term, he is entitled to do so after its expiration. And there are many cases which decide, that, although the grant of the next presentation be made to a man and his heirs, yet it shall go to his executors, and not to the heir.

But it is said there are exceptions to this general rule,

(a) See 4 Leon. 109; Fitz. N. B. 33 P., 34 B., 34 N., P., and many other authorities.

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one of which is, that, where the patron is the incumbent, the vacancy occasioned by his death shall not be filled up by his executors, but by his heir, upon whom the advowson descends; and for this is cited the case of *Holt v. The Bishop of Winchester* (a). But, what is the reason given by the Court for this? It is, that all is done in an instant—the descent to the heir, and the falling of the advowson to the executor; and that, where two titles accrue in the same instant, the elder shall be preferred: as in the case of joint tenancy, where one devises his part, the title of the devisee and of the survivor happen in the same instant, and the title of the survivor, being the elder, shall be preferred. Another exception is, where the patron is a bishop, and entitled to the living in right of his see; in which case, if the bishop dies after the vacancy and before it is filled up, the King, and not the executors of the bishop, shall present.

Various reasons are given in the books for this; one is said to be, for that nothing can be taken for the presentation, and therefore it is not assets. This surely cannot be the reason; for, if it were, it would apply to every case, and entirely do away with what is admitted to be the general rule in presentative livings. Another reason given is that it is a spiritual trust, and consequently, on the vacancy of the see, vested in the King as the supreme patron and head of the Church. Is that the reason? The vacant turn is by all the authorities considered as part of the temporalities of the see. The King takes it as such. It passes to a third person by the grant of the temporalities; and nothing can be more strong to shew that it is considered as disannexed from the advowson, than that the vacancy remains unfilled not only until after the consecration of the new bishop, but, after the restitution of the temporalities, the vacancy is still to be supplied by the King or his gran-

(a) 3 Levinz, 47.

tee, and not by the new bishop, to whom, if not considered as so disannexed, it would naturally pass as part of the advowson. The rights of the Crown upon this subject are stated in *Watson's Complete Incumbent* (a).

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If the rule be that all ecclesiastical patronage is a spiritual trust, and cannot be transferred into lay hands, what becomes of the case of an archbishop's options, which are to all purposes considered as chattels, and his personal property? He may devise them, and if he does not they pass to his personal representative. It is true, that, after the vacancy happens, the options cannot be sold; and, although it cannot be supposed that any archbishop would sell them during his lifetime, yet there may be cases in which his executor or administrator might be compelled to do so before a vacancy happens; as, for instance, on the application of a residuary legatee, or one of the next of kin.

A distinction is attempted to be made between ecclesiastical and lay patronage, because it is said that in the latter the church is secure from an improper person being presented by the bishop's right to refuse the party presented. But there is in fact no ground for this distinction. In this very case the administratrix claims only to present. The bishop of *Lincoln* is to judge of the fitness of the person presented. And so it is in all presentative livings, whether of ecclesiastical or lay patronage. The bishop of the diocese in which the benefice is situate is to examine and decide upon the fitness of the person presented.

I am not aware of any authority which has determined that a grant by an ecclesiastical patron of a presentative living to which he was entitled in respect of his ecclesiastical preferment is void, although of course he cannot grant it beyond his own life. In *Watson* (b), it is said to have been held that a grant by a bishop of an archdea-

(a) Cap. 9, p. 48.

(b) Page 53.

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county for twenty-one years, though void against the successor and the King, is good as against himself. And many of such grants in antient times are to be found in the books of entries. I will not trespass upon your lordships' time by stating them at length, but merely refer to the books in which they are to be found. *The King v. The Abbott of — (a), Stanhop v. The Bishop of London and Others (b), Webster v. The Archbishop of York and Woodruffe (c), Hill v. The Bishop of London and Others (d), Bastall (e), Adamson v. The Bishop of Lincoln and Others (f), Overton v. Syddall (g), and Byng v. The Bishop of Lincoln (h).*

Although there does not appear to have been any decision in these cases, yet Mr. Justice Ashhurst (i) says that, "the forms of legal proceedings are evidence of what the law is." In one case, indeed, that of *London v. Southwell (k)*, the pleadings of which are in *Winch's Entries (l)*, it was held that an advowson did not pass by a lease made by a prebendary, not because the grant of an advowson by a spiritual person was illegal, which, if the law were so, would have been a short answer to the case, but because the words of the lease were not sufficient to comprise it. And in the case of *Armiger v. The Bishop of Norwich and Holland (m)*, the Court said that the grant by a bishop of an advowson, though void, under the statute 1 *Edw. c. 19*, against the successor and the Queen, was good against the bishop whilst he continued to hold the see. And in *Poyner v. Charlton (n)*, it appears that a grantee of a dean and chapter of the next avoidance recovered it in *quære impedit*.

(a) Ver. Int. 110.

(g) Co. Ent. 122.

(b) Hob. 237; S. C. Winch's

(h) Winch, 853.

Ent. 825.

(i) 2 Term. Rep. 636.

(c) Co. Ent. 507.

(k) Mich. 804.

(d) Co. Ent. 508.

(l) Page 810.

(e) Page 522.

(m) Cro. Eliz. 690.

(f) 2 Brown. 233.

(n) Dyer, 135.

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Much stress has been laid by the counsel for the plaintiffs in error on the case of *Repington v. The Governors of Tamworth School* (a), in which it was held, that, in the case of a donative, the right of donation descends to the heir, and that the executor has no title, which the Court said he would have had if it had been a presentative living. This case is so very miserably and scantily reported that it is impossible to ascertain the grounds of the decision. It does not militate against the general rule which I have stated in the early part of what I have addressed to your lordships, and which, as I have above stated, the Court, in giving their judgment in the case of *Repington v. The Governors of Tamworth School*, said would have governed that case if it had been one of a presentative living.

Another ground of objection taken to the plaintiff's claim is, that, admitting the vacant turn to be a chattel, still that the plaintiff is not entitled to present, because it is said that the prebendary is a sole corporation, and that a sole corporation, except in the case of the King, cannot take a chattel by succession. That a sole corporation, except in the case of the King, cannot take a chattel in succession is true; but what appears to be the fallacy of the argument on this part of the case is, that the prebendary did not take the void turn by succession. The advowson goes to the next prebendary by succession, and if the void turn went with it, it must be as a part of the advowson; for, if disannexed from it, and a chattel, as it is stated by the authorities to be, he could not take it.

It appears to me, however, that the moment the vacancy happens it becomes a chattel vested in the then prebendary in his individual capacity, and passes to his representatives in the same manner as rent or any other fruit of the prebend which has accrued or fallen during his lifetime. And for this I would refer to the case cited in Mr.

(a) 2 Wilson, 150.

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Justice *Holroyd's* judgment, from *Co. Litt.* (a), and to the passage in *Fitzherbert's Natura Brevium* (b)—that, if a vicarage happen void, and before the parson presents he shall be made a bishop, yet he shall present to the vicarage, because it was a chattel vested in him.

With respect to any distinction that arises from the form of the presentation of the last incumbent which is set out in 11 *J. B. Moore*, 192, and 3 *Bingham*, 279, supposing your lordships can take notice of it, which I apprehend your lordships cannot, framed as is the record in this case, in which the patron states himself to be prebendary of the prebend of *South Grantham*, antiently founded in the cathedral church of *Salum*, and, in right of that prebend, the true and undoubted patron of the rectory of *Welby*, in the county of *Lincoln*, in the diocese of *Liscola*.

I am not aware of any determination that so much need be stated, or that the common form which is to be found in *Burn* (c), would not be sufficient. That form runs thus:—

“ I, Sir *W. B. P.*, true and undoubted patron of the rectory of the parish church of ———, in the county of ———, and in your diocese of ———, now vacant by the death of *A. B.*, the last incumbent thereof.”

But, if that form be necessary where presentation is made by the prebendary himself, it does not follow, that, because the administratrix cannot use that precise form she cannot present at all. In the common case, the executor or administrator cannot use the precise form used by the patron. It must of course be adapted to the particular situation of the party.

In considering the answer I should give to your lord-

(a) Page 99. a. (b) Page 34 N (c) 1 *Burn's Eccl. Law*, 150.

ships' question, I have confined myself to the matters contained in this record. Of the several documents stated in the judgment of the noble Lord who was Chief Justice of the Court of *Common Pleas* when the case was determined in that Court, we have no judicial notice. They were not, they could not have been, given in evidence upon this record. Nothing decisive can be drawn from the general history of the foundations of prebendal churches, or the appropriation of livings to them. There does not appear to have been any general mode of appropriation. They are stated to have been made to the body, or to some one particular member of it. Of what was the course pursued in the case before us we have no judicial notice; nor any evidence, either judicially or otherwise, respecting the will of the founder.

Under these circumstances, therefore, in a case admitted to be of the first impression, and upon which no precise authority can be found, it seems to me that the safer course is to follow the general rule applicable to presentative benefices.

My humble answer to your lordships' question therefore is, that the right of presentation belongs to the personal representative.

Mr. Justice LITLEDALE, for the reasons detailed in the judgment delivered by his lordship when this case was before the Court of *King's Bench* (a), signified his concurrence with such of the learned Judges as were of opinion that the right of presentation passed to the personal representative of the deceased prebendary, but declined to add thereto any further arguments.

Mr. Justice PARK.—When the case out of which the question propounded by your lordships for the opinion of

(a) 7 Barn. & Cress. 145.

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his Majesty's Judges first arose before the Court of *Common Pleas*, I took infinite pains, by reading much in ecclesiastical history, by consulting our text writers (for, as to decided cases, there are none), and, after that, after hearing two very elaborate arguments at the bar, and long consultations with the then Lord Chief Justice of the *Common Pleas*, my Lord *Wynford*, I came to the conclusion that Mrs. *Rennell*, as administratrix of her deceased husband, was not entitled to that which she claimed; and, in giving which opinion, I am happy to say I concurred with Lord Chief Justice *Best* (now one of your lordships' House), and Mr. Justice *Burrough*, a man who for legal knowledge and sound and correct understanding, was of no ordinary standard. To err in judgment with two such Judges, if err we did; can be no disgrace to any man.

When this case was removed from the Court of *Common Pleas* into the *King's Bench*, by writ of error, three of the learned Judges of that Court reversed the judgment of the Court below, against the opinion of Lord *Tenterden*, the Chief Justice. So here, again, the Judges were three to one against the judgment. Thus, four Judges were opposed to four; and therefore we need not wonder that this case has found its way into your lordships' House.

I have again heard this case argued with great learning and ability at this bar. I have considered every argument and studied the judgments of my different learned brethren, and the authorities they have quoted; and, though I do not deny that my mind has now and then fluctuated, which great learning and great ingenuity at the bar will frequently occasion, I have arrived at the same conclusion I did in the *Common Pleas*, viz. that the administratrix of Mr. *Rennell* is not entitled to the presentation to the church in question, the advowson of which belonged to Mr. *Rennell*, as prebendary, in right of his prebend in the church of *Salisbury*: and that is the answer I propose to give to your lordships' question.

Before I enter into the argument, which must be almost a repetition of what I formerly delivered, and which is now in point, I hope I may be allowed to assert, that, had any thing passed, either in the Court of *King's Bench* or in this House, which had convinced my understanding that my former opinion was erroneous, I should be one of the first to acknowledge my mistake, and to retract my judgment. I have done so on two other occasions in this House, and shall never be ashamed to make such an avowal: for none but a weak, nay a wicked mind will persist in error, if the understanding and more matured reflection convince a man that he had before formed a wrong judgment.

It is admitted, then, that it is not necessary for your lordships to decide, upon this record, who has the right of presentation to the living in question. The point is, whether Mrs. *Rennell*, as administratrix to her deceased husband (which must be in his *natural* capacity), has established her claim to a living, the advowson of which belonged to her deceased husband in right of his prebend of *South Grassham*. Not that, upon that question, I have not a clear opinion; for, I do not think it goes to the Crown, as it was surmised it did: but I think it goes to his successor in the stall or prebend of the church of *Salisbury*.

A point has been much insisted and argued upon, which seems to me to be the foundation of all the misconception in this case; but it is a point upon which there is no difference of opinion—*viz.* that, in the case of *lay* patronage, in the events which have happened, the patron dying after the actual vacancy, the personal representative, and not the heir, would have been entitled to the presentation; because, in merely *lay* patronage, the church *having become vacant in the life-time of the last possessor*, it thereby became a chattel, went to the executor as personal property being severed, and therefore no longer remained with the advowson as a part of the possessions of the heir of the person seised of the advowson; and in that case it is a

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mere question between the representatives of the same patron. Of this law there is now no doubt, grounded upon the authority of decisions, and of a practice long known; although I own I cannot state or discover any reason very satisfactory to myself for deciding that the void turn, in the life-time of the patron, is a mere chattel, when the question arises between the heir and the executor of a natural person; for, Lord *Coke*, in his *First Institute* (a), says, "that such a turn is not assets;" and therefore nothing can be made of it for the payment of debts: therefore the rule between heir and executor cannot depend upon considerations of that sort. But I agree with Lord *Tenterden*, that the want of a satisfactory reason is not a sufficient ground for overturning a practice long established. This, however, in my way of considering this case, leaves the point still open; and I cannot find from any of my learned brethren in any Court, who have judicially given any opinion, nor from any industry displayed at the bar in the Courts below or in this House, nor from my own laborious reading and research upon this subject, that in any Court in *England* has such a case in specie ever been decided.

The question is, in my view, whether lay and spiritual patronage are not to be considered as standing upon a very different footing. That facts similar to those which have occurred in this case must have existed many hundred times, no man can doubt; and that ecclesiastical patrons thought it clear one way or other must be the reason why no decision upon such a point is to be found in our books. I myself verily believe, that, till this claim was set up, no spiritual person ever imagined that those rights which a man held *jure ecclesiæ* merely could be exercised by others after his death; the words of the grant to such a person being—"We *duly* and *canonically*

(a) 1 Inst. 388. a.

invest *you* (not 'your executors, &c.,') in and to the said prebend and canonry, and invest you with all and singular the rights, members, privileges, and appurtenances thereunto belonging:" otherwise one cannot but think, that, in five or six hundred years, such a claim would have been contested, and the point by some legal decision ascertained. No distinction can be more broadly drawn in the whole law of *England*, than that between the lay and the spiritual function and character: even the variety of cases and statutes quoted by my learned brothers who have gone before me, and which I shall not fatigue the House by wading through, established the distinction. Certain personal rights belong to one of these characters which do not belong to the other.

The transmission of Church property also stands under very different considerations from the transmission of lay property; for instance, a person seised of a freehold right is said to be *seised in his demesne as of fee*: a clergyman, as in this declaration, is said to be seised in his demesne as of fee, *in right of his prebend or canonry*. I cannot deny that many of the evils and absurdities which I contemplate by giving effect to Mrs. *Rennell's* claim, will also arise in *lay* patronage; because it must be admitted, that, by giving the presentation to the *personal* representative of a *lay* patron, it may fall to a very inferior person to present: but this evil arises out of the unfortunate situation in which lay patronage stands, and which I contend ought not to be carried one single point further; especially where the rule hardly applies, the *lay patron* acting in his *natural*, the other in a *politic or corporate* character.

What was the origin of lay patronage? I have looked much into it, and the result of all my researches is this—that it arose in the infancy of society, and, under these circumstances, that, though the appointment of fit persons to officiate throughout a diocese was originally in the bishop, yet, when lords of manors and other great men of

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old were willing to build churches and to endow them with glebes and mansion-houses for the accommodation of fixed and resident ministers, the bishops, for the encouragement of such pious undertakings, were content that those munificent persons should have the nomination to churches so built and endowed by them, reserving to themselves still the right of judging of the fitness of the persons so nominated. "*Si quis ecclesiam cum assensu diocessani construxerit, ex eo jus patronatus acquiritur.*" And hence have followed all the consequences of a mere lay possession or property—chattels, where chattels, going to the executor; the rights of the heir to the heir in cases where, by the common law, the rights of the heir were paramount to those of the personal representative.

But still the question recurs—do these rules apply to the *spiritual* patron? and can the rights and property which belong to his *politic* character be dealt with as if he were a private person? Of this there can be no doubt in our law now; and I hope lay and spiritual patronage ever will be upon a very different footing.

Bishop Gibson, in his *Codex* (a), decisively marks this distinction. That very learned prelate says, and his authority upon subjects of this nature has always been considered as entitled to great respect—"The right or property which the *patron* has in an *advowson*, will not warrant a plea, as it is in temporal property (of course, therefore, the bishop is contrasting it with an *advowson* in spiritual hands), that he is seised *in dominico suo, ut de feodo*, but only *de feodo*," The reason of which is given by Lord Coke (b)—"because *that* inheritance (*viz.* an *advowson*) savoureth not *de domo*, and cannot serve for sustenance either of himself or his household, nor can any thing be received of the same for defraying of charges." And in the case of *London v. The Church of South-*

(a) Page 757.

(b) 1 Inst. 17. b.

well (a), where the words of the lease were, commodities, emoluments, profits, and advantages to the prebend belonging, it was adjudged that the advowson did not pass by the said words: because, said the Court, all the words used implied things gainful, which is contrary to the nature of an advowson regularly.

Why is this so? I say it is so because an advowson in the hands of a sole corporator, a churchman, is not a matter of *profit*, but of naked *trust* merely; and the churchman who has an advowson appendant to an ecclesiastical dignity, has it as a mere matter of trust *in jure ecclesie*, which he can only exercise for the benefit and advantage of the Church of which he is a member, and of which only as a member of the Church could he have a right to dispose. Mr. *Rennell*, therefore, had only a right as member of the church of *Salisbury*; and the moment he expired, all his rights as a member of that church ceased. Suppose, instead of his death, he had resigned his prebend of *South Grantham*, having omitted to fill up this living, could it have been for a moment alleged that he still had a right to it as a *fruit fallen* during his holding the prebend?

Am I right in stating to your lordships that this is a matter of *trust* only? for, upon that much of the argument has turned. I wish to found myself again upon the authority of Bishop *Gibson* on this point (b). Founding himself on the authority of Lord *Coke* even in cases of *lay* patrons—Guardian in *socage* shall not present to an advowson, because he can take nothing for it, and by consequence he cannot account for it; and, by the law, he can meddle with nothing he cannot account for. Which said doctrine and the plain tendency thereof are exactly agreeable, not only to the nature of advowsons, which are merely a trust vested in the hands of the patrons by con-

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(a) Hobart, 303.

(b) Codex, 757, 758.

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sent of the bishop, *for the good of the church and of religion*, but also to the express letter of the canon law, the rule of which is, *jus patronatus cum sit spirituali annexum vendi vel emi non potest*. In another place, the bishop says, they are *mere trusts for the benefit of men's souls*. If this be so in the origin of these things, even as to lay patronage, however the exercise of the right of selling advowsons and next presentations, when the churches are full, may have grown up, am I not right in stating to your lordships that this great difference exists between lay and ecclesiastical patronage; and though it may now be impossible to shake the custom of making *profit* of advowsons in the hands of laymen, the other has always been considered as *a mere trust* to be exercised by the patron *for the benefit of the church*, for the due discharge of which he alone is to look, which he alone is competent to consider with a view to the welfare and advantage of religion, in this respect committed to his sole care, and upon which his personal representative may be absolutely unable to form a judgment.

It may appear to your lordships an unfit argument to state to this house; but, when I gave my judgment in the Court below, I thought, and I think so still, that it is one of vital importance to the interests of that Church which every good man must love and revere, and to which I have never received a specious answer, except that the same inconvenience may occur in lay patronage, and which I admit—Suppose a prebendary died insolvent as well as intestate, and that all his next of kin, as they probably would in such a case, renounced administration, and that his butcher, baker, or other tradesman, being a creditor, took out administration; must such a person present? is such a person capable of forming a correct judgment of a person fit for the cure of souls? And yet I defy the ingenuity of man to get out of the dilemma; for, if Mrs. Rennell is to present, the tradesman must, under the circumstances supposed, have exactly

the same right. I lament that the same consequence would follow in *lay* patronage: but I am quite sure, till compelled by the judgment of your lordships' House, I cannot consistently with my feelings to your lordships, nor to myself declaring a judicial opinion, advise that such lamentable consequences should be carried one step further.

That the presentation now under consideration is not assets of value, is quite clear: it may be a chattel, but, in the hands of an ecclesiastic, a chattel of mere trust. It is admitted by every Judge, and by every counsel that has spoken upon this subject, that there is a total silence of our law books, during the whole period of our ascertained law of *England*, upon this precise point, although circumstances similar to the present must have existed many times: and this to me is a strong, convincing proof, that, till these days of novelty, no such idea was ever entertained upon this question; and I verily believe that no man now living ever before heard of such a claim being advanced. Nothing, I think, can be put in a stronger light than was done by my learned brother *Burrough* when this case was before the Court of *Common Pleas* (a). "The allegations of this declaration are, that the late prebendary, in his lifetime, and at his death, was *seised* of the prebend or canonry founded in the cathedral church of *Sarum*, with its appurtenances, to which the advowson of the rectory in question is annexed, in his demesne as of fee and right, in right of the said prebend or canonry. By our known law, a prebendary or canon is an ecclesiastical sole corporation. As such, he can have no heir; he can have no personal representative: as such, his prebendal rights or property cannot go, either to his natural heir, or to his personal representative. Where must these things go? To his successor. In their corporate capacities, in estimation of law, the predecessor and successor being one, it is a continuance

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(a) 11 J. B. Moore, 162.

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of the same corporate body. This is more visible in an aggregate corporation; when one of the body dies, the body corporate remains. A prebendary or canon is a corporator in two respects; in one respect as member of the corporation of dean and canons. He is one of the chapter, having *sedem in ecclesiâ, et vocem in capitulo*. He is a corporator sole as prebendary. In every relation in which he stands to the Church, he is a corporator."

I do not presume to state to your lordships any thing particular respecting the constitution of this canonry of *South Grantham*, though much pains have been taken respecting it by Lord Chief Justice *Best* and Mr. Justice *Burrough* in the Court below; because, though there can be no doubt of the authenticity of the documents from whence their information was drawn, yet we are not judicially informed of the foundation of this particular prebend. When, therefore, in this declaration, the prebendary is said to be seised in his demesne as of fee, *in right of his canonry*, it cannot be meant a seisin to him and his heirs; for, as a canon, he has no heir: it must, therefore, mean to him and his successors. We find in all our law books the same law that I have above stated as to ecclesiastical sole corporations, from the highest to the lowest order of the Church: thus, it is always said the freehold is vested in the spiritual incumbent, but, if we could suppose it vested in him in his natural capacity, on his death it might descend to his heir, which cannot be: the law has therefore wisely ordained that the spiritual person, as such, shall never die, any more than the King, by making him and his successors a corporation. By which means all rights are preserved entire to the successor; for, the present incumbent of a spiritual charge and his predecessor who lived centuries ago, are in law one and the same person. But, if the personal representative or even the natural heir were to intervene, the succession would be broken (a).

(a) 1 Bl. Com. 470.

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The position of Lord *Tenterden*, agreeing with the majority of the *Common Pleas*, though differing from his own more immediate brethren, has put this case in a strong and luminous point of view. "It is clear," says, his lordship (a), "that the administratrix cannot present in right of the prebend, because the prebend is not vested in her. If, therefore, she be allowed to present, she must present in a right different from that in which the intestate would have presented; and this will not be conformable to the general rights of an administrator, which are those only that belonged to the person or personal property of the intestate. She is the administratrix of the personal rights and property of the intestate; but I find no authority for saying that she is the administratrix of his politic rights or property also. If, in the case before the Court, it be held that the administratrix is entitled to present, it cannot be denied that a right generally annexed to a prebend will, in the particular instance, be exercised, not merely by a person who has not the prebend, but by a person claiming as if he from whom the title is derived, and who had the advowson in his politic capacity, had in fact held it in his natural capacity. A decision to this effect will be contrary to the nature of the right."

Some stress was laid, in arguing this case, upon the statute of 21 Hen. 8, c. 11, and I own I was at first impressed with the argument arising upon it. But, upon considering the statute, and the motive for making it, it now appears to me to have no bearing upon the case. The statute was made at the dawn of the reformation; and it appears that the then heads of the Church, following in that respect the example of the See of *Rome*, exercised, or endeavoured to keep in their hands, the temporalities of the Church which belonged to them in their corporate character, whether aggregate or sole, an unreasonable

(a) 7 Barn. & Cress. 197, 199.

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time for their private benefit, to the great ruin, and impoverishment of persons appointed to livings. The statute deprived them of that right, and gave the benefit to the new incumbent, from the death of the last, and to the executors of such new incumbent, if he should happen to die before he realized those interests which the statute thus gave to him.

Much stress has also been laid, both at your lordships' bar, and at the bar of the Courts below, on the options of the archbishops, which I admit are allowed to be the subject of devise, and may go to executors. But I answer, they are anomalies in the law, and the exception proves the general rule. They were originally, Mr. Justice *Blackstone* thinks, derived from the legatine power formerly annexed by the Popes to the metropolitan of *Canterbury*, and that right has been continued to the archbishops in their respective provinces of *Canterbury* and *York*, even after the power of the Popes has ceased in this country. But all these anomalies, I again repeat, support my general argument to show that the rights of *lay* and *ecclesiastical* persons stand upon a totally different foundation; and that the law, attaching, as it may, upon property of this description in the hands of a *lay* person, does not attach upon the same species of property in the hands of one who holds *jura ecclesiastica*.

The case of *Repington v. The Governess of Tamworth School* (a) has been much pressed; but it is difficult to ascertain the grounds of that judgment. It was a case of a donative, and Lord *Tenterden* thinks that the decision may have proceeded on the ground that the Court thought the rule as to presentative benefices in lay hands not well founded, and therefore not to be extended. A donative is, however, of a very peculiar nature; and therefore any decision respecting that may be considered as anomalous

(a) 2 Wilson, 150.

also. And, indeed, Mr. Justice *Blackstone*, speaking of donatives, considers them as exceptions; for, he says (a): "These exceptions to general rules and common rights are ever looked upon by the law in an unfavorable view, and construed as strictly as possible. If, therefore, the patron (of a donative) in whom such peculiar right resides does once give up that right (by presenting his clerk to the bishop, and procuring institution and induction), the law, which loves uniformity, will interpret it to be done with an intention of giving it up for ever; and will therefore reduce it to the standard of other ecclesiastical livings."

The ground of my opinion is, that this species of interest, in the case of *spiritual* patrons, whether aggregate or sole, is a mere personal trust, to be exercised by him or them in the spiritual character, which he cannot consistently with his high duty, if he be a sole corporator, either devolve upon another during his life, or, at his death, leave to be exercised by his heir or personal representative. He holds *jure ecclesiæ*, and in that right only: if he had it not in that right, he could not have it at all; and, when he dies, all his rights, powers, and privileges derived from the Church absolutely cease, as if he had never existed. This is no new notion; for, that laborious and learned writer upon ecclesiastical law, Dr. *Burn* says (b)—Dr. *Godolphin* having said, that, after the death of a prebendary, the dean and chapter shall have the profits; but, by the statute 28 *Hen.* 8, c. 11, the profits of a *prebend* during the vacation shall go to the successor: Dr. *Burn* reconciles this apparent contradiction thus, which bears on the discussion now before your lordships: "The issues of those possessions which he has in *common* with the rest of the chapter (that is, a corporation aggregate) shall after his death be divided amongst the surviving members of the

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(a) 2 Bl. Com. p. 24.

(b) 3 Burn's Eccl. Law, 7th edit. p. 92, tit. "Deans and Chapters."

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chapter; but *the profits of those possessions which he has in his separate capacity as a sole corporation of himself, shall be and accrue to his successor.*" Dr. Burn seems well supported in this distinction, by the case of *Young v. Lynch (a)*. Therefore, if a member of a chapter, which is an aggregate corporation, should die after a living had become vacant, it seems to me that his personal representative might as well contend for a voice in the chapter as to the filling it up, as that such representative should have it to himself exclusively, where a living belonged to him as a sole corporator merely: although Dr. Burn more justly says it would go to the surviving members of the chapter; in the other, to the successor. When Bishop Gibson says advowsons may be granted by *deed or will, &c.*, he is evidently speaking of lay patronage only; for, he adds: "This general rule is to be understood with limitations, that it extends not to *ecclesiastical persons of any kind or degree who are seised of advowsons in right of their churches*; all these being restrained, as to bishops, by statute 1 *Elix.*, and the rest by 13 *Elix.*, from making any grants but of things corporeal, *of which a rent or annual profit may be reserved*: and of that sort *advowsons and next avoidances, which are incorporeal, and lie in grant, cannot be.*"

This distinction between laity and clergy pervades every page of our ecclesiastical history; and those well read in the history of our venerable Church will immediately recognize the justice and accuracy of those principles I have been endeavouring to establish. It is well known, that, in the early periods of the Church history of this country, the *parochia*, or parish, was the episcopal district (*b*).

(a) Sayer, 84.

(b) In the infancy of the Saxon Church, the scanty supply of missionaries was unequal to the multiplied demands of the people intrusted to their care. The bishop

either followed the Court, and preached according to his leisure and opportunity, or fixed his residence in some particular spot, whence, attended by his clergy, he visited the remoter parts of the

The bishop and his clergy lived together at the cathedral church, and all the tithes and oblations of the faithful were brought into a common fund, for the support of the bishop and his college of presbyters and deacons, for the repair and ornament of the church, and for other works of piety and charity. At this time, and in the infancy of society, the stated ordinances of religion were performed only in these single choirs, to which the people of each whole diocese or *parochia* resorted, especially at the more solemn seasons of devotion. But, in order to supply the inconvenience of distance from the mother church, the

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diocese. Churches were not erected, except in monasteries, and the more populous towns; and the inhabitants of the country depended for instruction on the casual arrival of priests whom charity or the orders of their superiors induced to undertake these obscure and laborious journeys. The inconvenience of this desultory method of instruction was soon discovered; and *Honorius of Canterbury* is said to have first formed the plan of distributing each diocese into a proportionate number of parishes, and of allotting each to the care of a resident clergyman. *Godwin de Præsul* p. 40. But this attempt, if made, was probably confined to the territories of the *Kentish Saxons*. To Archbishop *Theodore* belongs the merit of extending it to the neighbouring churches, from which it was gradually diffused over the remaining dioceses. That prelate exhorted the thanes to erect and endow, with the permission of the Sovereign, a competent number of churches within the precincts of their estates; and, to

stimulate their industry, secured to them and their heirs the right of patronage. *Smith's Bede*, 189, n. *Whelock's Bede*, 399, n. *Spelman's Councils*, 152. The bishops appear to have ceded the right of advowson to the lay proprietor on these conditions—that he should build a church and habitation for the clergyman, should assign a certain portion of glebe land towards his support, and should grant him the tithes of his estate. If the thane afterwards built another church, and the bishop permitted it to have a burial ground, the incumbent might claim one third of the tithes; otherwise he was to be supported at the expense of the patron. *Wilkins*, pp. 103, 245, 300, 302.

Theodore, however, was careful not to deprive the bishop of that authority which was necessary for the government of his clergy. Though the right of advowson was vested in the patron, the powers of institution and deprivation were reserved unimpaired to the diocesan. *Wilkins*, 103, xxiii, 105, lvii.

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bishop was wont to send forth some of his clergy to preach and dispense the word and sacraments; and these missionaries returned to give to the bishop a due account of their labours and success. As the wants of society for spiritual instruction increased, and when the members of the episcopal college found it inconvenient to go forth, certain churches were allotted, some by laymen (where they had the patronage given them as a compensation for having built and endowed churches, and hence the origin of lay patronage, as before shewn); some by the bishops to the prebendal body at large; some to one particular member of the body: all which may be seen by those who will take the trouble of looking into the antient records of the Church. Thus, those churches which were not in lay hands became prebendal; and the supply of the duty was left to the aggregate corporation where the perpetual advowson was in the whole community of the dean and chapter; or to that sole corporation, or single canon or prebendary, who was to have his prebend or exhibition from it. In progress of time the representative curates, who were to account for their profits, and only to receive a small stipend for their services, were so ill paid that the bishop obliged his clergy who had such advowsons, to retain fit and able *capellans*, *vicars*, or *curates* (for, these are all nearly of the same import), with a competent salary. This failing, the bishop again interfered, and obliged the clergy (that is, the chapters, or the single prebendary, in whom the perpetual advowson, in right of the chapter, or in right of his prebend, of which he was seised *jure ecclesiæ*, was vested) to make the presentation to spiritual persons to be endowed and instituted, who should thenceforth have no more dependence upon their spiritual, than others had upon their lay patrons, with a competent maintenance to be assigned by the bishop. Much of this information may be inferred from the statutes 15 Ric. 2, c. 6, and 4 Hen. 4. c. 12.

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I have not thought it necessary, in giving this detail to your lordships, to refer to authorities; but what I have advanced will be found as the early history of our Church, in various books well worthy the attention of the curious, such as *Spelman de non temerandis ecclesiis*, Bishop Kennett *on Impropriations*, and Burn's *Ecclesiastical Law*, title "Appropriation:" and much is also to be found in *Dugdale (a)*. But I have presumed to trouble your lordships with this short history of the Church, because it seems to me to prove incontrovertibly, that what is thus vested in the Church for *spiritual* purposes, vests in them as a *body politic*, and can never be allowed to fall into the *private common stock* of the body at large, or of the *individual sole corporator*. And it will be found that what is said of the Church at large, is no less true of the church of *Salisbury*, as was luminously shewn by Lord *Wynford* and Mr. Justice *Burrough* in the Court below.

Thus, then, an ecclesiastical person, during his incumbency, is entitled to all the *profits* that may fall of a chattel nature. But, when a living falls vacant, to which he has a presentation *in right of his church*, as it is not a matter of *profit*, he merely presents *quasi* incumbent.

I have shewn to your lordships, that the living in the present case was probably endowed out of the prebend, or the advowson attached to the prebend of *South Grantham*; in either case, the prebendary, as a sole corporator, for the time being has the right of presentation, and when the avoidance happens he may present *in right of his church*: he presents as a *trustee*; the trust is *personal*, *without profit*, and cannot be transmitted. How, then, can a private personal representative of a deceased prebendary who dies after avoidance, but before presentation, claim the presentation? Is it that he makes it a

(a) 3 Dugd. Mon. 371.

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chose in action, out of which to pay the debts of the testator or intestate? That cannot be, for it is not assets. Does he claim to present because this trust had devolved upon, or, as it were, become vested in the testator or intestate? The trust has, indeed, devolved upon him, but not *in his own right*, but, as the declaration truly states, in right of his prebend. The presentation is in him, not for his own use or benefit, but for the use and benefit of the church confided to his *spiritual*, not to *lay* lands, for the dignity and ornament of the church—a trust which *he*, and *he only*, must execute upon his great *personal responsibility*, for the *cure of souls*, and for the advancement of the interests of religion—a duty which his personal representative in his natural capacity cannot in law be deemed qualified to discharge.

I fear I have fatigued your lordships with the length of the argument; but, as some of my brethren unfortunately differ from me, I could not satisfy my conscience upon this great, and, as I think, awfully momentous question, without satisfying your lordships that I have not come to the conclusion I have done, without most anxious consideration and deep research.

The result of my opinion is this, that, whatever is attached to a spiritual sole politic body, sinks with the death or resignation of the party who possesses that right.

Mr. Baron BAYLEY.—As the opinion I delivered when this case was before the Court of *King's Bench* is in print, and as I see no reason to vary from any of the grounds upon which that opinion was founded, I shall not be obliged to detain your lordships at any considerable length.

I take the general rule (with the single exception of benefices in the gift of bishops) to be, that, when a benefice becomes vacant, the right to present is immediately detached from the estate which gives that right; it vests as a mere personal power of presenting in the individual who

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had the right of patronage at the time that vacancy occurred, and will continue in him and his personal representatives, let what will become of the estate which gave such right. Therefore, if the right to present to an advowson appendant or an advowson in gross, when a vacancy occurs, be in tenant in fee or in tenant in tail, and he die without presenting, though the *estate* will not pass to his heir or devisee in the one case, and to the issue in tail or remainder-man in the other, the right to present will devolve upon *his executor or administrator* (a). If the right to present when a vacancy occurs be in tenant *pur autre vie*, or in a termor, and, before he present, *cestui que vie* dies, or the term expires, so that the estate which gave him the right to present is gone, that right nevertheless remains in him, and he may still present (b). Again, if husband and wife be seised in fee or in tail, or in right of dower of the wife, and the church become void, and the wife die before the husband present, though the fee descends upon her heir, or the estate tail passes to the heir in tail, or the estate in dower ceases, the right to present remains in the husband (c). And if a vicarage become vacant, and the parson to whom the right of presenting belongs be made a bishop (whereby his right in the parsonage ceases) he shall nevertheless present (d). So, had Mr. *Rennell* been promoted to a bishopric, would he have lost the right?

The general rule, however, is not disputed; but its application to the present case is denied; and the ground of that denial is, that the present is an exception—*first*, because Mr. *Rennell* was a spiritual corporator, and

(a) Fitz. Nat. Brev. 33 P, 34 B; Co. Litt. 388; Dyer, 283 a; 21 Hen. 7. pl. 6; Bro. "Presentation al' Eglise," pl. 34.

(b) Fitz. Nat. Brev. 34 B; Bro. "Presentation al' Eglise,"

pl. 22.

(c) 21 Hen. 6. B.; 38 Hen. 6. 36 b; 14 Hen. 4, 12; Bro. "Presentation al' Eglise" pl. 22; Co. Litt. 120.

(d) Fitz. Nat. Brev. 34 N.

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had this right of presentation annexed to a spiritual dignity, and clothed with a spiritual trust. My answer is, that, though Mr. *Rennell* was a spiritual person, the dignity to which the right of presentation was attached was not in its creation spiritual; and that, if it were, it was not clothed with any spiritual trust. Mr. *Rennell's* dignity was a prebend only, and at common law a layman might be a prebendary. *Bland v. Maddox* (a). A prebendary has no cure of souls; he is called prebendary because his duty is *præbere auxilium episcopo*. It is only under the 13 & 14 Car. 2, c. 4, s. 14, that he must be in holy orders. He has his possessions annexed to his prebend to enable him to provide for himself and his family. It is by the restraining statutes alone that he is prevented from alienating (with the consent of the patron and ordinary) all his possessions, to the disherison of his successor; he has of himself the full power of alienating them so as to bind himself; and it is not of necessity that he should have any possessions (b).

But, admitting that a prebend were a spiritual dignity, does it follow that church preferment in the gift of the prebendary in right of his prebend is clothed with a spiritual trust? Is the spiritual preferment to which a bishop is entitled in right of his see clothed with any spiritual trust? May he not grant away the next avoidance of any church, though the advowson be in gross, which he as bishop is entitled to fill, or as many avoidances as shall happen within his own time? and will not such grant bind himself? *Watson* says he may make the grant, and it will bind him (c). If an advowson be appendant to a manor usually let, and a lease be made thereof, it will at all events bind the bishop who made it, and his lessee shall present.

(a) Cro. Eliz. 79.

Abr. 341.

(b) 3 Rep. 75 b.—Dyer, 61 b.,
 pl. 30.—50 Edw. 3, 26.—2 Roll.

(c) *Watson*, c. 10, pp. 135. 136.
 —c. 45, p. 873.

Gibson says (a): "Adwosons may be granted by deed or will, and either for the inheritance, or one or more turns. But this extends not to ecclesiastical persons seised in right of their churches, nor to colleges or hospitals seised in right of their *houses*, for they are so far restrained by the statutes of *Elisabeth*, that their grants, though confirmed, will not bind their successors: but they will bind the grantors for their own times." And, if the grant be made conformably to the statutes, it will bind the successors (b). In *Smallwood v. The Bishop of Coventry* (c), the bishop had made a grant of the next avoidance of an archdeaconry (a spiritual dignity), and he afterwards disturbed the grantee; the grantee died, and his executor brought a *quare impedit*, and the bishop's grant was held good, and the executors had judgment. In *Foord's case* (d), a perbendary of this very church made a lease of a rectory, parcel of his prebend, for seventy years, the dean and chapter confirmed it for fifty-one years, the successor disputed it within fifty-one years. *Watson* says it would have been good for his own time without confirmation (e), and all the Court (except *Griffin*) held it good for the fifty-one years. In *London v. The Chapter of Southwell* (f), where the plaintiff claimed in *quare impedit*, as lessee of a prebend to which the advowson belonged, the question was whether the lease had words sufficient to carry the prebend or not; and it was only because the words were not sufficient that the decision was against the plaintiff. The presentation to a vicarage belongs of common right to the parson; but, by consent of patron and ordinary, he may grant it to another (g). The case of *Sharrock v. Boucher* (h) seems

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(a) Codex, p. 797.

Dyer 388 b.; Cro Eliz. 447, 472.

(b) *Watson*, c. 10, p. 137—c. 45, pp. 875, 876.(e) *Watson*, 481.

(c) Cro. Eliz. 207.

(f) Hobart, 303.

(d) 1 And. 47; 5 Rep. 81;

(g) Fitz. Nat. Brev. 34 A.

(h) T. Raym. 88; 1 Levinz, 125.

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to shew the distinction between what is clothed with a spiritual trust and what is not, and what may be alienated and what cannot. A prebendary leased his prebend for three lives, and, whether that passed the right to fill up the office of commissary within the prebend, was the question; the Judges agreed it did not, if the right belonged to his spiritual functions; but on that point they were divided.

The only remaining point is founded upon the rule which prevails in the case of the King and a bishop, and a supposed analogy between that case and this. When a bishop dies leaving a church in his gift vacant, the King is to present, not the executors of the bishop (*a*). And if this rule be founded upon the spiritual character of the act of presenting, it is an authority in this case; if it be founded on the relation between the bishop and the King, and is referable to the King's prerogative, it is not: and I am of opinion it is referable to the relation between the bishop and the King, and to the King's prerogative. The King is the sovereign patron of every bishopric (*b*). And upon the death of a bishop, the see comes to the King as the bishop left it; and if the deanry or a stall be left vacant, the King shall fill it up (*b*). A prebendary of *Abergavilly* died; the bishop (of *St. David's*) died; the temporalities were seized into the King's hands; a new bishop was appointed, and filled up the stall. The King brought *quare impedit*, and it was adjudged that he had the right, and a writ was awarded to the bishop (*c*). The temporalities come to the King, as founder, by prescription (*d*). And this is so high a prerogative, and so far incident to and inseparable from the Crown, that a subject cannot claim it

(*a*) If a vacancy occurs after the prebendary dies, and before a successor is presented, who shall fill it up?

(*b*) 17 Edw. 3, 40.

(*c*) *Rex v. The Bishop of St. David's*, 50 Edw. 3, 26.

(*d*) Mallory, 65—a. to pl. 1.

by grant or prescription (*a*). And if the King die, *sede vacante*, the succeeding King shall have the temporalities, not the King's executor (*b*). And if the King die, leaving a church void, the succeeding King shall present (*c*). And this though the church become void in the bishop's life, and though the new bishop has sued out livery out of the King's hands before the King presents (*d*).

In the case of a bishopric, therefore, if the bishop dies, whatever spiritual preferment in the gift of the bishop was vacant at the bishop's death, and whatever shall become vacant till the see is filled up, devolves upon the Crown, and is inseparable from the Crown, so that the Crown cannot grant it away; and in case of the demise of the Crown, it will pass, not to the executor of the deceased King, but will accompany the Crown, and go to the succeeding King. Upon this, two observations occur—one, that, in the case of the Crown, and in the case of the Crown only, can a sole corporator, which the King is, take a chattel by succession; so that what is the rule in the King's case, where the right to present may, by reason of the prerogative, pass from bishop to King, and from King to King, will not apply to the case of a prebendary, where there is no such prerogative, to pass the right from prebendary to prebendary (*e*)—the other, that what is the case of the Crown with reference to a bishop who holds *per baroniam*, is the case with every (other) tenant *in capite*, where the tenancy, by reason of infancy in the heir, becomes as it were suspended, and the tenancy returns in wardship to the King. Lord Coke (*f*) is express upon this point, and puts the two cases together, that of the

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(*a*) Mallory, 65, n. to pl. 6.

(*b*) Ibid. n. to pl. 4.—Bro. "Chattels," 2.—2 Roll. Abr. 211.

(*c*) *Semb.* Mallory, 65, pl. 4, and n.—Ibid. 42, pl. 16.—Bro. "Chattels" 2.—2 Roll. Abr. 211,

(*d*) Mallory, 65, pl. 5.—2 Roll.

Abr. 343, pl. 5.—Watson, 73.—Fitz. Nat. Brev. 33 N.

(*e*) 16 Vin. (Q. 14.)—17 Vin. (Y.)

(*f*) Co. Litt. 388. a.

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King's tenant *in capite*, and that of a bishop. If the King's tenant by knight's service *in capite* be seised of a manor to which an advowson is appendant, and the church become void, and the tenant die (leaving his heir in ward), the King shall present, not the executor. And if a church in the gift of a bishop become void, and the bishop die, the King shall present, not the executor (a). The right, therefore, of the King, in the case of a bishopric, appears to me to be referable, not to the spiritual character of the person from whom the right comes, but to the King's prerogative, because it obtains equally in the case of every tenant *in capite*, whether he be a spiritual person or not.

Upon the whole, therefore, I am of opinion that the general rule is, that, if a church become vacant, and the patron die, the right to present devolves upon his executor; that this is the rule also where a prebendary in right of his church is patron, because, until the statute of Car. 2 (b), it was not necessary a prebendary should be a spiritual person, and because, in the case of spiritual persons, their right to present to churches is temporal, not spiritual, inasmuch as they may grant it away before a vacancy occurs, as they may their other temporal possessions; and that the excepted case of a bishop is not applicable to other spiritual persons seised of advowsons in right of their dignities or churches, because the case of a bishop is referable to the prescription of the Crown, which enables the Crown to take a chattel in succession, and to the relation in which the Crown stands to a bishop, the bishop being tenant *in capite* to the Crown; not to the spiritual character of the bishop, nor to any spiritual nature in the right.

My answer, therefore, to the question proposed by your lordships is, that, in the case that question propounds,

(a) Co. Litt. 388. c.

(b) 13 & 14 Car. 2, c. 4, s. 14.

the right of presenting belongs to the executor of the deceased prebendary.

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Lord Chief Justice TINDAL.—Upon the best consideration I can bring to this case, I have come to the conclusion that the right of presentation belongs to the personal representative of the late prebendary; but, at the same time, I am ready to admit that it is after considerable doubt upon the question which has been submitted to us by your lordships.

If I felt myself at liberty to look at the particular foundation of this prebendal stall, or to consider upon general principles what might be most fitting and expedient in the case of patronage belonging to an ecclesiastical corporation, such as is a prebendary, I could bring myself without difficulty to the conclusion that the right to fill up the turn which was vacant at the time of the late prebendary's death, ought to devolve upon his successor, and not to go to his personal representative. But, neither upon the abstract question proposed by your lordships, nor upon the facts stated on the record in this case, can I take judicial notice either of the circumstances attending the original foundation of this prebend, the endowment thereof with this particular advowson, or the form of presentation which has been used and adopted on occasion of former vacancies. And, as to any considerations derived from general expediency, I feel myself restrained from entering into them, because there appears to me to be an analogy of sufficient strength and certainty to bring the present case within the reach of acknowledged principles of law, and the authority of various decided cases. It is upon the ground of this analogy which exists between the present case and those principles and authorities that I feel myself bound to concur in the opinion which has been expressed by the majority of his Majesty's Judges; thinking it a safer course, upon this occasion, as I find has been the opinion of other Judges from the earliest periods of

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the law, to adhere to any rule which can be safely inferred from the cases, than to substitute another, although it may appear upon general principles more reasonable and more just.

I assume it to be settled law, admitting of no doubt or dispute, and not requiring to be supported by reference to any authorities, that, where an advowson presentative is vested in any person in his natural capacity, either in fee or for life, and the church becomes void, and the owner dies after such avoidance without making any appointment, the right to appoint to the vacant turn belongs to the executor, and not to the heir, or to the next owner of the advowson. Indeed, so clearly is this principle recognized, that all the books concur in calling the vacant turn a chattel vested in the testator (a). In the case in *Fitzherbert's Natura Brevium* (b), it is stated, that, if a man be seised in fee in gross, or in fee appendant unto a manor, and the advowson become void, and he dieth, his executor shall present, and not his heir, because it was a *chattel vested and severed from the manor*. If the chattel is severed from the manor in that case, why may it not be considered as severed from the prebend in this? And, if once severed, it is difficult to assign any legal principle upon which it can be reunited. Unless, therefore, some solid ground can be laid down upon which a distinction can be made between a prebendary seised of an advowson in right of his prebend, and a person seised in his own natural right of a manor to which an advowson is appendant, there can be no doubt but the case falls within the general rule, that the right to present is a chattel interest, and will go to his personal representative. It will be advisable, therefore, to refer to some of the cases and principles which carry the analogy more closely to the particular question now under discussion.

(a) Fitz. Nat. Brev. 33 P., 34 N.; 4 Leonard, 109.

(b) Page 33 P.

In *Fitzherbert's Natura Brevium* (a) is found this case—
 If a vicarage happen void, and, before the *parson* present, he is made a bishop, &c., yet he shall present unto this vicarage, because it was a chattel vested in him. The authority referred to is 24 *Ed. 3*, 36; but the case, which is not to be found in the *Year Book*, will be found inserted nearly in the same words in *Fitzherbert's Abridgment* (b). In that case, as in the present, the patron was seised *in jure ecclesiæ*; and, notwithstanding he ceased to be rector, he still carried with him in his natural capacity this chattel interest, the right of appointing to the vacancy. In that case it was held that the chattel interest which had once vested in him did not afterwards reunite with the corporation sole, the parson. That case appears to me to be a direct authority upon the present question, to this extent—that, if the living had become void, and the prebendary had vacated the prebend, the right of appointment would have belonged to him, not to his successor. If so, and he still retained the right to appoint notwithstanding his cesser of the prebend, on what principle shall his *death* be held to reunite the presentation with the prebend from which it has once been severed? The case in *Rolle's Abridgment* (c) shews the law where the avoidance of a vicarage happens *after* the vacancy of the rectory, and before the new rector is appointed—"If the parson has the right to present to the vicarage, yet, if the vicarage becomes void during the vacancy of the parsonage, *the patron* of the parsonage shall present." So that, although the rector be in the nature of an ecclesiastical corporation sole, and although the rector be seised of this right of presentation *jure ecclesiæ*, yet it shall not devolve to the successor: but, if it happen *before* the vacancy, the former rector shall appoint; if *during* the vacancy, the patron—both

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(a) Page 34 N.

(b) Title "Quare Impedit," 22.

(c) 2 Roll. Abr. 346 (F), pl. 4.

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which cases are strong to shew that there is an indissoluble union between the right of presentation and the prebend itself. To which may be added the case stated in *Fitzherbert's Natura Brevis* (a), "that, if a bishop die seized of a manor to which an advowson is appendant and the advowson happen void before his death, the King shall present unto the same, by reason of the temporality, and not the bishop's executor." The reason is, that the King takes the temporalties by reason of his prerogative, and the term, being once vested in him, cannot be got out of him but by matter of record. Now, although the express point adjudged by that case does not apply here, because there is no prerogative in this case, yet it furnishes an observation, which appears not unimportant. *Fitzherbert* puts the case in apposition with that which had immediately preceded it, namely, the case in which he had stated, "the executor shall present, and not the heir," because it was a chattel vested and severed from the manory &c." He then puts the case of the bishop, and the inference to be drawn is, that, but for the prerogative, the executor would have presented; otherwise, he would not have said, the King shall present, and not the bishop's executor; the observation would have been, the King shall present, and not the successor. If this is a just inference, the authority of the case last referred to would go the length of deciding the present: if the executor of the bishop would be entitled to present to the turn which fell vacant in the bishop's life, and which belonged to the bishop *jure ecclesie*, had not the prerogative stepped in and prevented him, it would follow in the present case, where no such prerogative exists, that the executor has the right to present to the vacant benefice.

The power of the prebendary to grant the next turn to a stranger before it becomes vacant, affords a further ar-

gement against the notion that the right of presentation is to be considered as inseparably annexed to the prebendary himself for the time being, on the ground that it is an ecclesiastical trust to be exercised by him only to whom the foundation has given it. Such grants are of very frequent recurrence in the old books of entries containing pleadings in *quære impedit*; and it is impossible to conceive that they should be found there unless the practice was common, or that they would have been put upon the record if such grants were against law, inasmuch as the plaintiff deriving title under them would only be shewing the insufficiency of his right to sue. Again, the universal practice of grants made to the archbishops by bishops of their province, of these rights of presentation well known by the name of options, furnish at least the inference, that, though the right to present comes to an ecclesiastical character, still there is no rule of law that it must be exercised in person, but that the law allows it to be transferred to another. It may, indeed, be said that this is not a transfer to a layman or a stranger, but merely to an ecclesiastic of the same or a higher dignity; and therefore this ecclesiastical trust may be presumed not to be violated by such transfer of its execution. Admit it to be so, still how can we reconcile to that principle the right which the archbishop has to devise these options to any one he chooses to select? And that such power exists appears from the case of *Potter v. Chapman* (a), where the only question before Lord *Hardwicke* is made upon the propriety of the particular appointment by the trustees under the archbishop's will, but none whatever upon the right of the testator to bequeath them to his trustees. If, then, the bishop may sever and disannex from his bishopric a right of presentation to which he becomes entitled *jure episcopatus* and no otherwise; still further, if the archbishop to

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(a) Ambler, 98.

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whom the grant hath been made may bequeath it to a stranger by his will, or, what is an identical proposition, if it would devolve upon his personal representative in case he made no such bequest; it will surely be dangerous to build an opinion that the presentation now in dispute must belong to the successor, on the ground that it is of an ecclesiastical character, in the nature of an ecclesiastical trust, and, by reason thereof, must be exercised by the person who fills the prebendal stall, and by him only. So that the doctrine laid down in *Doctor and Student* would appear to be correct, where no distinction whatever is introduced between presentations made by laymen, and presentations made by ecclesiastical corporations; between advowsons appendant to manors, and advowsons appendant to offices of the Church; but it is laid down generally thus (a)—“It is holden in the laws of the realm, that the right of presentment to a church is a temporal inheritance, and shall descend by course of inheritance, from heir to heir, as lands and tenements shall, and shall be taken as assets, as lands and tenements be.” And again—“The goods of spiritual men be temporal, in what manner soever they come to them, and must be ordered after the temporal law, as the goods of temporal men must be.” Now, if the vacant turn in a benefice be a chattel interest, as the authorities above referred to seem abundantly to shew, if it passes by grant, is devisable by will, or, in case of no bequest, goes to the personal representative, then indeed is the passage above cited a strong proof of the opinion of learned men at the early period when that book was written, that no just distinction can be taken between a right of presentation vesting in a spiritual man, by whatever means it may come, and a similar right in a layman. It affords a further argument that the right to present to the vacant living cannot devolve upon the successor and go along with the prebend, that a prebend is a corporation sole; and that, by law, a corporation sole is

(a) *Doctor and Student*, Dial. 2, ch. 26.

incapable, except by custom, of taking in succession chattels real or personal, either in possession or action (a).

If this be the law, how can this vacant turn once severed from the prebend become reunited, and descend with the corporation sole? That such would be the case as to some of the profits of the prebendal stall, where they fall due in the life-time of the predecessor, appears clear. Rent which accrued due in his life-time, would go to his executor; for, the statute 28 *Hen.* 8, c. 11, gives to the successor the rent only which accrues *during the vacancy*—leaving the right to the rent due in the predecessor's life-time, where it then stood; that is, as a chose in action, or a personal chattel, which would go to the personal representative. But it is very difficult to draw a sound distinction between rent which has fallen due, and a right of presentation which has attached during the life of the former prebendary, except upon the ground that the one is a right of a temporal nature, the other of a spiritual: and, whether that be a sound distinction or not, I must leave upon the names and authorities which I have before given. The case of the donative cited from *Wilson* (b) does indeed furnish some inference for a different opinion from that which I have formed; but I must confess myself unable to see the grounds upon which that judgment proceeded, in so short and unsatisfactory a report, with such a degree of clearness as to place it in competition against the other principles to which I have referred, and which lead my mind to a different conclusion.

I have, therefore, felt myself bound, by the analogy to be drawn from cases decided as to lay advowsons, to adopt the opinion that the right of presentation in this case belongs to the administratrix of the late prebendary. I must admit at the same time, that it might be more fitting and

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(a) Co. Litt. 9. a., 46. b; Hobart, 64.

(b) 2 *Wilson*, 150.

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expedient that it should devolve upon the successor; but I am not asked by your lordships what is most expedient, but what the law at present is upon the question submitted to us.

Judgment for the defendant in error (a).

(a) When this cause was before the Court of *Common Pleas*, that Court, by a majority of three Judges against one, decided in favour of the right of the succeeding, in preference to that of the personal representative. The judgment of the Court of *Common Pleas* was reversed by the *King's Bench*, on the opinions of three Judges, against one—that Court holding the right of presentation to be in the personal representative. The *House of Lords* reversed the judgment of the *King's Bench*, and affirmed that of the *Common Pleas*, by a majority of six Judges against two. But, on this occasion, some of the Judges who delivered opinions had taken part in the previous judgments in the Courts below. The result therefore of the opinions of all the Judges who at the various stages of the cause pronounced opinions is this:—In favour of the right of the personal representative, *seven*, viz.—Lord Chief Justice Tindal, Mr. Baron Bayley, Mr. Justice Halliday, Mr. Justice Littledale, Mr. Justice Gaselee, Mr. Justice J. Parks, and Mr. Justice Bosanquet. *Contrà—five*, viz.—Lord Chief Justice Tentenden, Lord Chief Justice Best, Mr. Justice Park, Mr. Justice Burrough, and Mr. Baron Bolland.

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Friday,
May 25th.

DOE, on the demise of HEARLE and Wife, v. HICKS.

THIS was an action of ejectment brought by the lessors of the plaintiff to recover possession of a mansion called *Plomer Hill House*, and the estate thereto belonging. The cause was tried before Mr. Justice *Helbyrd*, at the last *Summer Assizes* for the county of *Bucks*. A verdict was taken for the lessors of the plaintiff, subject to the opinion of the Court upon a special case, which was in substance as follows:—

“On the 4th May, 1821, *John Hicks* made and published his will, duly executed and attested to pass real estates; by which he devised all that his copyhold messuage, &c., called

Where a devise in a will is clear and unambiguous, a revocation of it by a codicil must be expressed in terms equally clear and free from doubt.

A testator devised to his wife, during her life or widowhood, a copyhold messuage and premises called *P. H.*; and, in the event of her death or second marriage, he directed the trustees

to be seised and possessed of the premises upon the same trusts as (regard being had to the nature and quality of the tenure of the said copyhold premises) would best correspond with the uses declared concerning the residue of his real estate. The testator then, after devising certain freehold property in trust for his son and daughter, and their heirs, bequeathed to his wife all his money in the funds during her life or widowhood, and, after her death or second marriage, to such person as should be either tenant for life or in tail of his residuary estate, with a power to her to appoint 500*l.* as therein mentioned; and then gave her absolutely all the ready money which should be in the copyhold house at the time of his decease, with all articles of plate, &c. He then devised all his household goods, plate, furniture, pictures, &c., not thereinbefore bequeathed, to the trustees, in trust for his wife during such time as by virtue of his will she should be entitled to the copyhold mansion and premises; and, after the determination of her estate in the same, in trust absolutely for the person who then, either as tenant for life or in tail male, should be in the actual possession of his residuary real estates. The will further gave the wife a rent-charge of 300*l.* a year for life charged upon the residue, with a contingent increase of 100*l.* *per annum* in case of the failure of issue of testator's son: and devised all the residue of his property to his son. By a codicil, the testator, referring to his will, and reciting the death of his son, devised to the husband of his daughter the freehold estate devised by his will to her, and gave his wife absolutely the additional annuity of 100*l.* *per annum*, and, revoking the bequest to her of the plate, furniture, &c., in the copyhold house, in lieu thereof bequeathed to her for her own use and benefit absolutely, all his farming-stock, household goods, &c., “and all other his effects which should be in or about his residence at *P. H.* (the copyhold) aforesaid, and usually considered as comprised in and constituting his establishment there.” By a second codicil, the testator constituted his wife sole executrix and residuary legatee. By a third codicil he gave her the proceeds and profits of certain shares which he held in the County Fire Office, for her life. And by a fourth—revoking and making void several of the dispositions theretofore made by him in his will and codicils, of all his freehold, copyhold, and personal estate and effects, instead and in the place of such devise, disposition, and bequest thereof, he gave, devised, and bequeathed all and every his freehold, copyhold, and personal estate and effects of every kind and description whatsoever and wheresoever situated, unto his daughter for life; remainder to his grandson, &c.: and he thereby ratified and confirmed the several annuities and donations by him in his will and former codicils bequeathed; and gave to his wife a further annuity of 100*l.*, to be paid with the like restrictions as the former ones given her by his will and codicils; thereby, in all other respects but what were above mentioned, confirming his will and codicils:—*Held*, that the devise in the will of the testator's copyhold messuage &c., called *P. H.*, was not revoked by the fourth codicil.

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Plomer Hill House, to the use of trustees, in trust for his wife, *Susannah Jemima Hicks*, during her life or widowhood, or until she should cease to reside at the said premises, or let the same, or permit the same to be occupied by any other person than herself, she paying all taxes and outgoings in respect thereof, and keeping the same in good and tenantable repair; and, in either of these events, to the same trustees, upon and for such trusts, intents and purposes, and with, under, and subject to the powers, provisos, and declarations, as (regard being had to the nature and quality of the tenure of the said copyhold premises,) would best or nearest correspond with the uses, trusts, intents and purposes, powers, provisos, and declarations thereafter expressed and declared of and concerning the residue of his real estates. He also devised a freehold estate called *Treravel*, to the trustees and their heirs, in trust to raise an annuity of 20*l.* *per annum*, and to pay the same to the separate use of his niece *Frances Mountstephens*; in trust to dispose of the residue of the rents to the separate use of his daughter *Anne Maria Hearle* for life; and in case his niece should die in the life-time of his daughter, then in trust to pay the whole to his said daughter; and, after the decease of his said daughter, but subject to the said annuity of 20*l.* to his niece, to the children of his daughter as tenants in common in tail; but, in default of issue, then upon the trusts declared as to his residue. He likewise devised certain freehold premises, naming them, and all the residue of his real estates, to the trustees and their heirs, to the use, intent, and purpose that his wife might take thereout one clear yearly rent-charge of 300*l.* *per annum*, with power of distress, &c.; and, subject to the rent-charge, to the use of his son *William* for life; remainder to trustees to support contingent remainders; remainder to the first and other sons of his said son, in tail male: and, on failure of issue, to the intent that his wife might take a further annuity of 100*l.* during her life or widowhood; with a

term for ninety-nine years in two of the trustees, to raise an annuity for his daughter, *Anne Maria Hearle*, for her separate use: remainder to the use of the testator's grandson, *John Graves*, for life; remainder in strict settlement to his first and other sons, &c.; remainder to the first and other sons of his daughter, *Anne Maria Hearle*; with a proviso, that, if any son of his daughter should be born in the life-time of the testator, he should take a life estate only, with remainder to his first and other sons in tail male; and powers of charging and leasing, except the *Plomer Hill House*, &c.: remainder to the testator's own right heirs. He further bequeathed to the same trustees all money in the funds, &c., upon trust to pay the interest and dividends to his wife during her life or widowhood, with power to her to appoint 500*l.* for the benefit of his said son and daughter: all his ready money, &c., which might happen to be in his mansion called *Plomer Hill House*, and the wines and stock, &c., on his said copyhold premises, to his wife for her own absolute use and benefit: all the furniture, &c., to his wife during such time as she should be entitled to his copyhold mansion; remainder, &c., as to all the rest and residue of his personal estate, to his said son for his own absolute use and benefit; with a charge upon his funded property, and, if insufficient, upon his residue, for payment of debts. The testator declared that the annuities to his wife were to be in addition to those settled on her at her marriage. He then appointed the trustees his executors. By a codicil, dated the 10th May, 1822, the testator, referring to his will, and reciting the death of his son *William*, devised *Treravel*, after the death of his daughter, to her husband, *Francis Hearle*, for life; with remainder to the same uses as in the will; charged all his residuary real estate with a further annuity of 100*l.* to his wife during her life or widowhood, over and above and in addition to the several annuities or yearly rent-charges of 300*l.* and 100*l.* by his will charged thereon or limited thereout to or in

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favor of his wife, as therein mentioned, and which he did thereby ratify and confirm; and all other provisions made for her by his will and codicil. He also changed (the residuary estate with a further annuity to his daughter, and of 100*l.* to her husband; he likewise, after reciting the bequest of his personal property at *Plomer Hill House*, to his wife for life, revoked that bequest, giving the same to his wife absolutely; and gave the residue of his personal property bequeathed by his will to his son, to his wife absolutely; he also made a provision for his great nephew, *William Mountstephens*, and ratified his will in all respects, save and except as altered by that codicil. On the 15th of July, 1822, by another codicil, he appointed his wife sole executrix and residuary legatee of his personal estate; and on the 18th of July, 1822, by a further codicil, directed that the proceeds of five shares which he held in the *County Fire Office*, should be enjoyed by his wife for life; after her death, by his daughter and her husband for life, and, after their decease, by his heirs in possession. By his fourth codicil, dated the 14th September, 1822, revoking and making void several of the dispositions theretofore made by him in his will and codicils of all his freehold, copyhold, and personal estate and effects of all and every kind and description, instead and in the place of such devise, disposition, and bequest thereof, he gave, devised, and bequeathed all and every his freehold, copyhold, and personal estate and effects of every kind and description whatsoever, and wheresoever situated, unto his daughter for life; remainder to his grandson, *John Graves*, and his heirs, in strict entail; the rents to accumulate for the benefit of *John Graves* in case he should not be twenty-one on the death of the testator's daughter; and, on failure of issue, that his estate should go and descend as by his will he had directed; and he thereby ratified and confirmed the several annuities and donations by him in his will and former codicils bequeathed; and gave and bequeathed to his wife a further annu-

ity of 100*l.*, to be paid with the like restrictions as the former ones given her by his will and codicils; "that by, in all other respects but what were above mentioned confirming his will and codicils." And by a fifth codicil, dated the 13th of July, 1823, he declared the property bequeathed to his daughter to be to her separate use, granted an annuity to her husband, gave and confirmed to his wife, and at her disposal, any sum of money she might be entitled to from the effects of her late father, or that any other friend should leave her, and ordered his executors, in case she should die before him, to fulfil her will and disposal thereof. The will and codicils were duly executed to pass real estates. The testator died in June, 1825, seized of the estates therein mentioned, leaving his wife, the defendant, and *Anne Maria Hearle*, him surviving."

The case was afterwards turned into a special verdict, whereupon judgment having been given for the lessors of the plaintiff in the Court of *Exchequer*, in *Hilary Term*, 7 & 8 Geo. 4, and reversed in the *Exchequer Chamber*, in error, in *Trinity Term* following. (a), the lessors of the plaintiff sued out a writ of error to remove the cause into the *House of Lords*, where, after argument before eight of the Judges, their opinion was delivered by,—

LORD CHIEF JUSTICE TINDAL.—The question which your lordships have been pleased to propose to his Majesty's Judges is this, whether, according to the true construction of the will and codicils which have been stated upon this appeal, the devise in the will of the testator's copyhold messuages or mansion-house, barns, stables, buildings and pleasure grounds, lands and hereditaments, called the *Plover Hill* estate, was revoked by the fourth codicil: and, upon this question, though it must be admitted to be difficult

(a) See 1. Younge & Jervis, 470.

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to draw any very certain conclusion as to the intention of the testator, the opinion which we have formed, upon the best consideration of these instruments, is, that the devise in the will above specified was not revoked by the fourth codicil.

The general principle upon which this opinion proceeds may be stated thus:—The testator does by his will shew a clear and manifest intention to devise the *Plomer Hill* estate to his wife, for life, or during her widowhood. If such devise in the will is clear, it is incumbent on those who contend it is not to take effect, by reason of a revocation in the codicil, to shew that the intention to revoke is equally clear and free from doubt as the original intention to devise; for, if there is only a reasonable doubt whether the clause of revocation was intended to include the particular devise, then such devise ought undoubtedly to stand.

My lords, it is the opinion of my learned Brethren and myself, that the clause of revocation contained in the fourth codicil does not apply to the devise in question with such clearness and certainty as to operate as a revocation of that plain and explicit devise contained in the will.

In this general conclusion we all agree; but it is scarcely to be expected, that, in the discussion of a question of this nature, we should all arrive at the same conclusion upon grounds precisely the same. In stating, therefore, to your lordships these grounds upon which I have formed the opinion, not simply that there is no clear intention to revoke the devise, but that, upon the proper construction of the codicil, the clause of revocation does not apply to this particular devise, I cannot undertake to say that I am expressing the opinion of all my learned Brethren in each particular reason which I may advance, although in most of those reasons all concur, and I am not aware that there is any material dissent or diversity of opinion in respect to any. That the testator not only intended to devise to

his wife the enjoyment of the house and premises in which he lived, during her life or widowhood, but that it was a paramount object with him, appears abundantly by the will and first codicil. It forms the first subject of devise in his will—"In the first place, I give and devise all that my copyhold messuage or mansion-house, barns, stables, and buildings, pleasure grounds, lands, and hereditaments, called *Plomer Hill House*, in the parish of *West Wycombe*, and now in my own occupation, together with the cottages or tenements and premises thereto belonging to (the trustees therein named), and their heirs, upon trust for my present dear wife, *Susanna Jemima Hicks*, during her life or widowhood, or until she shall cease to reside at the same premises, or let the same, or permit the same to be occupied by any other person than herself, she paying all taxes and outgoings in respect thereof, and keeping the same in good and tenantable repair." And then, in the event of her death, second marriage, ceasing to reside, or letting the premises, or permitting any other person than herself to reside therein, he directs the trustees to be seised and possessed of these copyhold premises, upon the same trusts as (regard being had to the nature and quality of the tenure of the said copyhold premises) will best correspond with the uses declared concerning the residue of his real estates. He afterwards devises to his wife all his money in the funds, during her life or widowhood, and, after her death or marriage, to such person as should be either tenant for life or in tail of his residuary estate; with a power to her to appoint 500*l.* as therein mentioned: and then gives to her absolutely all the ready money which shall happen to be in his mansion-house called *Plomer Hill House* at the time of his decease, all the articles of plate brought by her on her marriage, his family carriage, and the wines, provisions, and provender, live and dead stock, which at the time of his decease "shall be on or about the said copyhold premises." He then de-

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vise: "all his household goods, furniture, books, prints, pictures, china, glass, and plate, not thereinbefore bequeathed, unto the trustees, in trust for his said wife during such time as by virtue of his will she shall be entitled to his copyhold mansion and premises, and, after the determination of her estate in the same, in trust absolutely for the person who then, either as tenant for life or in tail male, shall be in the actual occupation of his residuary real estates."

The testator, therefore, by his will has not only devised the mansion-house to his wife, but has shown a clear and anxious desire that his wife should continue to reside in the mansion which he then occupied, and that it should not in any manner be dismantled or unfurnished, but should be enjoyed by her in exactly the same state as that in which it was left at the time of his death. In his first codicil, made after the interval of a year, it is evident that the same intention that his wife should reside in the mansion-house, in the same state as left at the time of his death, continued to be predominant in the testator's mind; for, after reciting the bequest in the will to his wife of the plate, furniture, and other articles before adverted to, he proceeds to revoke such bequest in plain and direct terms, and in lieu thereof bequeaths all his farming-stock, household goods, &c., "and all other his effects which should be in or about his residence at *Plow Hill* aforesaid, and usually considered as comprised in and constituting his establishment there," unto his wife, for her own use and benefit absolutely. It is further to be observed that the testator's wife appears to have been from the time of the making of the will down to the time of making the fifth and last codicil, the object of his peculiar bounty and regard, there being no codicil with the exception, perhaps, of the third, which does not materially add to the provision already made for her by the previous dispositions in her favour. The will gives the wife a rent-charge of 300*l.* a-year for life,

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charged upon the residue, with a contingent increase of 100% *per annum* in case of the failure of issue of the testator's son. By the first codicil made after the death of his son without issue, he gives his wife absolutely the additional annuity of 100% *per annum*; and bequeaths to her the residue of his personal estate absolutely to her own use. By his second codicil he constitutes her sole executrix and residuary legatee. By the third codicil he gives her the proceeds and profits of the five shares which he held in the County Fire Office for her life. By the fourth, the codicil in question, he gives to his wife a further annuity of 100% *per annum* for life. And by the fifth he gives to her and at her disposal all sums of money which she or the testator might be entitled unto out of the effects of her late father, or that any other friend might leave her; and he orders his executors, "in case she shall die before him, to fulfil her will and disposal thereof." This codicil was executed about nine months subsequently to that upon which the question arises.

The will thus containing such a clear devise to the wife, with such a manifest indication of intention that she should reside in the mansion-house called *Plumer Hill*, and each codicil containing proof that the regard of the testator for his wife continued unabated and unimpaired until long after the execution of the fourth codicil, the first observation that arises is, that it is extremely improbable in itself that the testator should, by general words, without making any reference to his wife, or any disposition in lieu thereof in her favour, revoke the only devise of land which he had made to her, which forms the first subject of this will; to which repeated allusions are made in the will itself and first codicil, and her residence in which during her widowhood appears to have been the favourite object of his mind. Still, however, the question arises, whether he has by the fourth codicil revoked the devise or not? That the words used in the codicil do not necessarily revoke this

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devise, is sufficiently manifest by referring to them. The testator begins by saying—"I do make and add this further codicil to my will, hereby revoking and making null and void *several* of the dispositions heretofore made by me in my said will and codicils of *all* my freehold, copyhold, and personal estate and effects of all and every kind and description;" and concludes it by saying—"hereby, in all other respects but what is above-mentioned, confirming my said will and codicils." There are no words, therefore, expressly revoking this devise: on the contrary, if we hold *all* the dispositions of his real estate to be revoked, we construe the codicil directly against the testator's declared intention. It is as much open to argument that the devise to the wife may be one of these, or the very one, which the testator intended to confirm, as that it was one of the *several* which he intended to revoke. Whether, therefore, this devise was revoked, must be determined, not by any express words to that effect, but by the consideration whether, upon the construction of the codicil, the devise and disposition therein contained must of necessity be held inconsistent with the devise to the wife; or, whether such a construction may be put upon the devise in the codicil, that both the will and the codicil may stand together.

To consider this question, it is necessary, in the first place, to observe how the disposition of the testator's property stood under the will and the first codicil at the time when the first codicil was made: and, upon a careful inspection of the will and first codicil, it will be found, that, at the time of executing the fourth codicil, the testator's real property stood thus disposed of—*viz.* the copyhold estate (*Plomer Hill House*) was devised to the wife for life, the remainder forming part of the residue. The *Treravel* estate stood thus—an equitable estate to his daughter, *Anne Maria Hearle*, for life, for her separate use, remainder to her husband for life, remainder to her children in tail, as tenants in common; the remainder form-

ing part of the residue. The residue of his property, consisting of the manor and advowson of *Bradenham*, two freehold farms in the county of *Bucks*, and so much of the testator's estate in the *Plomer Hill* house and the *Trevor* property as were undisposed of, and also comprising all his personal property except the partial interests given to the wife, which have been before enumerated, formed one mass, which, at the time of making the fourth codicil, in consequence of the death of his only son without issue, stood devised immediately to the testator's grandson, *John Graves*, for life, remainder to his first and other sons in tail male, remainder to the first and other sons of the testator's daughter, *Anne Maria Hearle*, in tail male, remainder to his own right heirs.

Whilst his property stood thus disposed of, the fourth codicil is made; in which, after declaring his intention to revoke several of the dispositions made by him in his said will and codicils of all his freehold, copyhold, and personal estate and effects of all and every kind and description, "instead and in place of *such devise, disposition, and bequest thereof*, he gives, devises and bequeaths all and every his freehold, copyhold, and personal estate and effects of every kind and description whatsoever, and wheresoever situated, unto his daughter, *Anne Maria Hearle*, and, from and after the determination of that estate, unto his grandson, *John Graves*, and his heirs, in strict entail, as in the said will mentioned," with the additional clause in the codicil as to the time when *John Graves* shall take: "and, in failure of such issue of the said *John Graves*, he orders that his said estates and effects shall go and descend as is by his said will directed;" and then ratifies and confirms the several annuities and donations by him in his said will and former codicils given and bequeathed; and gives a further annuity of 100*l.* to his wife, under the same restrictions as the former. Now, if this devise in the codicil can be construed to be confined to the property which formed the testator's residue only, then the devise in the will of the

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copyhold estate in question to the wife for her life, will remain unrevoked, and the object of the testator in his codicil may still be carried into effect. And, that such may be the construction without violating the words of the codicil, appears to be by no means unreasonable. In the first place, the codicil professes to make void "*several* of the dispositions heretofore made by him in his will and codicils of *all* his freehold, copyhold, and personal estate and effects of all and every kind and description." Now, the only disposition made of *all* his freehold, copyhold, and personal estate and effects in that devise which relates to the residue, in which all his property, freehold, copyhold, and personal, is brought together in one mass, with the exception of that part of the personal estate which is given to the wife absolutely by the will, and which is expressly confirmed to the wife by the subsequent part of this very same codicil. In the second place, the testator says, "instead of such devise, disposition, and bequest," using the singular number, which would in strict grammatical construction be applicable to the devise or disposition of the residue, but not to the various dispositions contained in the will. In the third place, the death of his only surviving son, *William*, who was the first taker for life under the clause disposing of the residue, makes it not improbable that he should wish to substitute in the residuary clause *his only* surviving daughter, to take the same estate therein which was before given to the son. In the fourth place, if the devise to the wife of the copyhold estate is to be held to be revoked, then, not *several* only of the dispositions of the real property contained in the will, but *all* such dispositions are revoked or altered; for, the wife's life estate in the *Plomer Hill* property is gone; the equitable estate for life given by the will to the daughter in the *Treravel* estate for her separate use, is merged in a legal estate for life given to her generally; and the daughter has a life estate in the residue now for the first time interposed before that of *John Graves*. But, to revoke *all* the dispositions

of the realty in the will and codicil, is against the express directions of the testator.

Still further; if the devise of the *Plomer Hill* estate to the wife is revoked, inasmuch as the codicil confirms the donations made in the will and codicil, the wife would still be entitled absolutely to the furniture and to every thing which constituted the establishment of that house. So that the house, upon the death of the testator, would immediately go the daughter, but stripped and dismantled of all its furniture and establishment, which the testator appeared anxiously to intend should be kept together. Again, the codicil gives an estate for life to *Anne Maria Hearle*, and, from and after the determination of that estate, to his grandson, *John Graves*, and his heirs, in strict entail, "as in his said will directed." Now, this express reference to the will draws the attention to that part of the will in which alone there is any mention of *John Graves*, that is, to the disposition of the residue.

It seems, therefore, a very reasonable construction of the codicil, that, as the ultimate remainder of the property intended to be thereby disposed of, is limited by express reference to the clause in the will which contains the devise to *John Graves* in strict entail; to infer that the property itself devised by the codicil is the same property as that contained in the devise of the will to which such reference is made, viz. the residue only. By this construction, the only alteration effected by the codicil is, the substitution of a devise to the daughter for life, instead of that given to the son, to take place immediately next before the estate given to *John Graves*. But, if the devise operates on the residue only, it leaves, as before observed, the particular estate already devised to the widow untouched. There are, undoubtedly, some difficulties attending the construction of the will and codicil, whichever way they are construed. It may be said, against the construction above made, that the words of devise in the codicil to the daugh-

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ter are *immediate*, and that the testator, by his first codicil, shews that he knew how to interpose a new estate, by proper terms, between those already created by the will: It certainly is so; but it is obvious, on comparing the frame of the first and the fourth codicil, and, looking to the description of the witnesses to each respectively, that the former was made with, the latter without, legal assistance; so that no great reliance can be placed on that argument. It may be argued, again, that the testator by the codicil directs, that, in case his grandson shall not be thirty-one at the time the estates shall devolve on him *by the death of the testator's daughter*, the rents shall accumulate for his benefit; and that, if the wife took a life estate in the copyhold, *non constat* but that she might survive the daughter; in which case, the *Plomer Hill* estate would not devolve to the grandson on the daughter's death. But it is not at all surprising that a testator, in preparing such an instrument, should have overlooked, or not cautiously have provided for, the possibility of his wife outliving his daughter, the more especially where the devise to the wife related only to a part of the estate. It may further be contended, that, by the fifth codicil, the testator has proved that he was aware that the fourth codicil had revoked the estate for life which he had previously given by the first codicil to his son-in-law; for, he would not otherwise have devised to him the rents and profits of the *Treravel* estate during his life. It must be granted that the fourth codicil had necessarily that effect; but this arises, not from his devise of the life estate to his daughter; for, the only effect of that devise was, to convert her equitable estate for her own separate use, into a legal estate for life: but it arises from the devise to the grandson being made "from and after the determination of that estate"—words that necessarily excluded the devise to the son-in-law, which he had before made by his first codicil. This argument, therefore, does not seem to bear upon the question whether the life estate

to the widow is revoked or not. Upon the whole, although these, and perhaps other difficulties may be urged against the construction above proposed, we think the *onus probandi* of shewing that the devise to the wife is included in the clause of partial revocation, is cast upon those who claim under such revocation; and that it is not shewn with sufficient certainty that this devise to the wife is included in such clause: on the contrary, that, upon the proper construction of this codicil, the intention appears to have been, that the devise to the wife should not be revoked by the codicil. Upon these grounds, we think the devise in question has not been revoked.

Judgment affirmed.

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ACT OF PARLIAMENT.

Construction of.

E. B. by his will devised certain estates to his son *J. S.* for life; remainder to the sons of *J. S.* successively in tail, and for want of male issue, to the daughters of *J. S.*; remainder, in case of the death of *J. S.* without issue, to the testator's after-born sons, and their heirs; remainder to the testator's daughters, as tenants in common, and their heirs, and to the survivor of them in tail; with an ultimate remainder to the testator's own right heirs. The testator's daughters suffered recoveries to the use of *J. S.*; and by an act of parliament, reciting the will of *E. B.* and the recoveries, the trustees therein named were empowered to sell the devised lands, and to lay out the monies to arise from such sales in the purchase of land to be settled to such of the uses of the will of *E. B.* as were

then existing undetermined and capable of taking effect. *J. S.* had no issue. The trustees sold the devised lands, and invested the produce in the purchase of other land which was conveyed to them by a deed following the terms of the act:—*Held*, that, under this conveyance the trustees took an estate in fee simple in the lands so purchased. *Wortham v. Mackinnon*, 548

ACTION ON THE CASE.

See CASE.

ADMINISTRATOR.

See EXECUTORS & ADMINISTRATORS.

ADMISSIONS.

See PRINCIPAL AND AGENT, 2.

ADULTERY.

See BARON AND FEME, 1.

ADVOWSON.

An advowson belongs to a prebendary in right of his prebend, and the church becomes vacant, and the prebendary dies without having presented:—*Held*, that the right of presentation belongs to his personal representative. *Mirehouse v. Rennell*, 683

AFFIDAVIT.

I. *How entitled.*

Where a motion is made in a cause removed by writ of false judgment from a court of inferior jurisdiction, the affidavits must be intitled in the cause in error. *Watson v. Walker*, 437

II. *Defects in.*

That an affidavit is so framed that perjury could not be assigned thereon, is a defect not to be cured by waiver. *Watson v. Walker*, 487

And see FINES AND RECOVERIES, II.—
REGULE GENERALES, II.

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

See LEASE, I.

AMENDMENT.

I. *Of Declaration.*

No rule to plead necessary after. 420

II. *Of Record at Nisi Prius.*

In an action against a witness for not obeying a *subpoena*, the declaration, after reciting the writ of *subpoena*, stated that the plaintiffs caused the said writ "to be made known to, and shewn to the defendant, and caused a copy to be left with the defendant of the said writ of *subpoena*." When the cause came on for trial, it appearing that the writ of *subpoena* contained the names of other witnesses besides the defendant, and the copy served upon him was therefore not a full copy of the writ, the Judge caused the record to be amended thus—"caused a copy to be left with the defendant of so much of the said writ of *subpoena* as related to the said

ARBITRATION.

defendant:—Held, that the amendment was warranted by the statute 9 Geo. 3, c. 15. *Masterman v. Judson*, 367

III. *Of Recoveries.*

See FINES AND RECOVERIES, IV.

APPEARANCE.

Entry of, to process by original. 419

To a *scire facias*. - - - 427

And see PRACTICE, II.

APPOINTMENT.

See POWER, I.

ARBITRATION.

I. *Submission, effect of.*

1. By agreement before the cause was set down for trial, the parties referred "the cause, and the subject-matter thereof, and the issue therein, and the costs of such action," to the award of a barrister:—*Held*, that the arbitrator had no power to order a verdict to be entered. *Hutchinson v. Blackwell*, 513

2. After a payment of money into Court in a cause, the parties agreed to refer the settlement of the accounts between them to arbitration:—*Held*, that the arbitrators had no power over the costs in the cause up to the time of the payment into Court. *Stratton v. Green*, 668

II. *By Statute.*

Since the statute 9 Geo. 4. c. 92, an action at law is not maintainable by a depositor against the trustees of a Savings' Bank: the only mode of adjusting disputes is by reference, as pointed out by the 45th section of that act. *Crisp v. Banbury*, 646

III. *Mode of enforcing Award.*

By an order of *Nisi Prius*, the cause and all matters in difference

ATTACHMENT.

between the parties were referred to the arbitration of a surveyor, who found that, on the balance of accounts between the plaintiff and defendant, the latter had overpaid the former *24s.* The Court refused to grant an attachment against the plaintiff for non-payment of the sum awarded. *Thornton v. Hornby*, 48

ARREST.

See BANKRUPT, IV. 1.—REGULE GENERALES, III.

ARREST OF JUDGMENT.

See PLEADING, I, 4.—REGULE GENERALES, XV.

ASSIGNEES.

See BANKRUPT.—PLEADING, I. 2.

ASSUMPSIT.

For Work and Labor.

The plaintiff contracted for a certain sum to write for the defendants a treatise to be published in a periodical work called *The Juvenile Library*. Before the completion of the treatise, the defendants ceased to publish *The Juvenile Library*:—*Held*, that the plaintiff might recover on a *quantum meruit* for the part of the work he had done, notwithstanding he had neither delivered nor tendered the treatise, or any part of it. *Planche v. Colburn*, 51

ASSURANCE.

See INSURANCE.

ATTACHMENT.

For non-performance of an Award.
See ARBITRATION, III.

BAIL.

777

ATTORNEY.

I. Bill of Costs.

The Court refused to allow an attorney his costs of taxation, where his bill had been reduced by nearly one sixth. *Elwood v. Pearce*, 159
And see REGULE GENERALES, XIX.

II. Undertaking by.

An undertaking by an attorney to give a bail-bond to the sheriff is contrary to the statute 23 *Hen. 6*, c. 10, and void. *Lewis v. Knight*, 353

AVERAGE.

See INSURANCE, III.

AWARD.

See ARBITRATION.

BAIL.

I. To the Sheriff.

An undertaking by an attorney to give a bail-bond, is contrary to the statute 23 *Hen. 6*, c. 10, and void. *Lewis v. Knight*, 353

II. Special Bail.

1. Where the notice of bail is merely informal, and not an absolute nullity, the plaintiff cannot take an assignment of the bail-bond. *Bell v. Foster*, 518

2. An omission to describe the bail, in the notice, as housekeepers or freeholders, as required by the rule of *Trinity Term*, 1 *Will. 4*, can only be objected to when the bail come up to justify. *Ibid.*

3. The rules of *Trinity*, 1 *Will. 4*, as to bail, apply equally to town and country bail. *Anonymous*, 296

And see REGULE GENERALES, V.

III. Bail-bond.

1. The defendant, being arrested, obtained his discharge by giving the

plaintiff security for the debt. The security proving very inadequate, the plaintiff (without restoring it) again arrested the defendant for the same cause:—the Court ordered the bail-bond to be cancelled, with costs, no fraud being imputed to the defendant.

Wilson v. Hamer, 120

2. On a motion to cancel a bail-bond, on the ground that the defendant (a bankrupt) had since obtained his certificate, it being suggested that the certificate had been obtained by fraud, the Court (the parties consenting) directed an issue to try that fact. *Duncan v. Everett*, 521

And see *REGULE GENERALES*, V, VI.

BAIL IN ERROR.

Recognizance of. 418

BANKRUPT.

I. Who may be.

The wife of a convicted felon sentenced to transportation beyond seas for the term of fourteen years, but removed to and confined on board one of the hulks in this country, is liable to be made a bankrupt, if she trade on her own account, although she is in the habit of visiting her husband and holding communications with him during his confinement. *Ex parte Franks*, 1

II. Acts of Bankruptcy.

1. To substantiate an act of bankruptcy against a trader, evidence was given of his having caused himself to be denied to creditors, when he was at the same time seen concealing himself in a retired part of his shop. The Judge told the jury, that, if the bankrupt had kept his house, or had wilfully secluded himself for the purpose of avoiding his creditors, or had removed himself from that part of the

house where he had been accustomed to be found, to a more retired part, where he could not so readily be seen by his creditors, with intent to avoid them, he thereby committed an act of bankruptcy:—*Held*, that this direction was proper. *Key v. Shaw*, 462

2. The mere failure to keep an appointment made with a creditor is not an act of bankruptcy. *Ibid*.

III. Assignment, what passes by.

1. A second commission of bankruptcy, pending a first, is void, and no rights pass to the assignees under it. *Nelson v. Cherrill*, 452

2. The defendant held premises under a lease from one J. H. at a certain rent; and entered into an agreement with one N. for the sale of all the household furniture, &c., on the premises for a certain sum, to be paid by instalments; covenanting, on payment of the whole of the purchase-money, to demise the premises to N. for twenty-five years; the lease to contain the like covenants on the part of N. as were contained in the lease under which the defendant held. The agreement also contained a covenant that N. should, in the meantime, and until such lease should be granted, pay the rent and perform all the covenants which would be to be performed by him in case the lease was actually granted; with a power of distress for non-payment of the rent. N. was let into immediate possession under this agreement, and paid rent. The defendant neglecting to satisfy the rent due to the superior landlord, the latter distrained and sold the goods of N.:—*Held*, that the injury resulting to N. from the distress, gave a right of action to his assignees appointed under a commission subsequently issued against him. *Hancock v. Caffyn*, 581

3. By a marriage settlement, certain lands were conveyed to the trus-

tees to the use of the husband for life, with power of appointment to male issues, remainder to the trustees to preserve contingent remainders; remainder, in default of appointment, to the sons successively in tail general; remainder to the right heirs of the husband. After the marriage the husband became bankrupt, and his lands were conveyed by the commissioners to his assignees, by deeds of bargain and sale, who afterwards sold them, subject to the contingencies in the deed of settlement. The husband afterwards executed a deed of appointment to his son in fee, after the determination of his own life estate:—*Held*, that the son took no estate under the appointment, but that, under the marriage settlement, he took an estate tail in remainder, expectant on the determination of the life estate of his father. *Badham v. Mee*, 14

IV. Proof of Debts.

1. By the 49 Geo. 3, c. 121, s. 14, it was enacted that the proving a debt should be deemed an election by the creditor to take the benefit of the commission. The plaintiff proved a debt under a commission sued out against the defendant by virtue of that act, and, after the passing of the 6 Geo. 4, c. 16 (which repealed the 49 Geo. 3, c. 121), arrested the defendant for the same debt—The Court directed the defendant to be discharged from custody; holding that the plaintiff's election to prove under the commission operated as a final abandonment of his claim against the person of his debtor. *Adams v. Bridger*, 438

2. *W. S.* by settlement made on his marriage, covenanted that his executors should, within twelve months after his decease, pay to his wife's trustee 4,000*l.* with interest from the time of his death, in trust to pay the

interest to the wife for her life in case she survived him, and, after her death, the principal to be divided between the children of the marriage; and, if they had no child or children, to the survivor of them, *W. S.* and his wife, his or her executors, &c. *W. S.* became bankrupt, the wife being still alive:—*Held*, that the covenant to pay the 4,000*l.* was a debt payable upon a contingency, within the meaning of the statute 6 Geo. 4, c. 16, s. 56; and that the valuation should be, the present worth of 4,000*l.* payable twelve months after the death of the bankrupt. *Ex parte Tindal*, 607

3. In 1820, *W.* advanced 24,000*l.* to *J. C. S.* and *W. S.*, traders, and jointly with them executed a deed by the express terms of which a partnership stock was created in which they had all a joint property. *W.* was not to have any definite aliquot proportion of the profits, but was to have an account of the profits as between themselves, and to receive 2,000*l.*, or 2,400*l.* a year, as the case might be, out of the profits. *W.*'s name never appeared to the world as a partner. The firm became bankrupt in 1826:—*Held*, that *W.* was a partner in the concern, and that a joint commission against the three, as such joint partners, might be supported; and that the creditors of both the old and the new firm were equally entitled to prove against the estate of the latter. *Ex parte Chuck*, 615

V. Certificate for Costs under the 6 Geo. 4, c. 16, s. 90.

In an action by the assignees of a bankrupt, the defendant gave notice of his intention to dispute the petitioning-creditor's debt, the trading, and the act of bankruptcy. At the trial the cause was referred to arbitration, the defendant undertaking to admit before the arbitrator the debt, trading, and bankruptcy:—*Held*, that

the Judge had no power to certify for the costs occasioned by the notice, under the statute 6 Geo. 4, c. 16, s. 90, the cause not having been tried by him. *Barthrop v. Anderton*, 361

VI. Release to restore Competency.

1. In an action against sureties (the principal debtor having become bankrupt), a general release of the bankrupt and his property will not render the bankrupt a competent witness for the defendants, they having still a right, in the event of a verdict passing against them, to resort to his estate in the hands of his assignees, in the surplus of which the bankrupt retains an interest. *Perryman v. Steggall*, 540

2. A release by the bankrupt of his interest in the surplus would, it seems, restore his competency. *Ibid.*

VII. Sale by Sheriff after secret Act of Bankruptcy.

The sheriff sold goods under a *fiery facias* after a secret act of bankruptcy committed by the debtor, and, after notice of the act of bankruptcy, paid over the proceeds to the execution-creditor, under an indemnity:—*Held*, that the assignee might recover the amount from the sheriff in an action for money had and received. *Young v. Marshall*, 140

BARGAIN AND SALE.

See PLEADING, III. 2.

BARON AND FEME.

1. In covenant by a trustee upon a deed whereby the defendant covenanted to pay a certain sum yearly by way of separate maintenance for his wife, the declaration alleged, that, "by a certain indenture then and there purporting to be made between the plaintiff, the defendant, and others, it was witnessed that the defendant did cove-

nant, &c." The defendant pleaded that, after the making of the indenture, the wife had committed adultery with one A. T.: *Held*—first that the plea was no bar to the action—secondly, that the allegation in the declaration was sufficient after plea. *Baynon v. Batley*, 339

2. The wife of a convicted felon sentenced to transportation beyond the seas for the term of fourteen years, but removed to and confined on board one of the hulks in this country, is liable to be made a bankrupt, if she trade on her own account, although she is in the habit of visiting her husband and holding communications with him during his confinement. *Ex parte Franks*, 1

BILLS OF EXCHANGE.

Drawn payable at a particular place.

The drawer of a bill of exchange required the drawee to pay the amount to his order "in London;" the latter accepted it, "payable at Messrs. J., L., and Co's., London:—" *Held*, that, to charge the drawer, on non-payment by the acceptor, a presentment at Messrs. J., L., & Co's. was necessary, although by the statute 1 & 2 Geo. 4, c. 78, such acceptance is general. *Gibb v. Mather*, 387

And see SURETY.

BLOCKADE.

See SHIP AND SHIPPING, 2.

CANAL.

Obstructing Navigation of.

See NUISANCE.

CASE.

I. For breach of implied duty.

A proper form of action for a breach of the implied duty of a lessee

COGNOVIT.

to indemnify his tenant from the consequences of the nonperformance of his covenant with the superior landlord. *Hancock v. Caffyn*, 521

II. For false Representations.

The defendant's son having purchased goods from the plaintiffs on credit, they wrote to the defendant, requesting to know whether his son had, as he stated, 300*l.* capital, his own property, to commence business with; to which the defendant replied, that his son's statement as to the 300*l.* was perfectly correct, as the defendant had advanced him the money. It was proved, that, at the time of the advance, the defendant had taken a promissory note from his son for 300*l.*, payable on demand, with interest, which interest was paid. Six months after the communication to the plaintiffs, the defendant's son became bankrupt:—*Held*, that it was properly left to the jury to say whether the representation made by the defendant was false within his own knowledge; and, the jury having found a verdict for him, the Court granted a new trial. *Corbett v. Brown*, 85

CERTIFICATE.

For costs under the 6 Geo. 4, c. 16, s. 90.

See BANKRUPT, V.

CHARTER.

See TOLLS.

CHARTERPARTY.

See SHIP AND SHIPPING.

CHURCH.

See ADVOWSON.

COGNOVIT.

By a person in custody. - - 425

COPYHOLD. 781

COMMISSION.

See PRINCIPAL AND AGENT, 5.

COMPETENCY.

See EVIDENCE, II.

COMPOSITION DEED.

I. Conditional Assent of Creditor.

The plaintiff attended a meeting of the defendant's creditors, and concurred in certain resolutions for the execution of a release to the defendants on their executing an assignment of all their effects to trustees, for distribution amongst their creditors. The defendants and the trustees at first disputed the amount of the plaintiff's debt, but subsequently altogether refused to allow him to come in under the deed:—*Held*, that his having signed the preliminary resolutions was, under the circumstances, no bar to his right to sue the defendants for his original debt. *Garrard v. Woolner*, 327

CONDITION PRECEDENT.

See SHIP AND SHIPPING, 2.

CONSCIENCE, COURT OF.

See INFERIOR COURT.

CONTINUANCES.

Entry of. 430

CONVICTED FELON.

See BANKRUPT, I.

COPYHOLD.

I. Fines for Admittance.

The lord of a manor having taken a full fine on the admittance of a tenant for life, is not entitled to another full fine upon the admittance of the remainder-man as tenant in fee, unless the imposition of such latter fine is

authorized by a special custom of the manor. *Dean of Ely v. Caldecott*, 633
Inspection of court-rolls. 430

CORPORATION.

See TOLLS.

COSTS.

I. Interlocutory.

The payment of costs for not proceeding to trial, is not a condition precedent to the party's right to proceed to trial; but such costs may be set off against the costs in the cause.

Doe d. Hope v. Carter, 516

And see *Wilson v. Collins*, 518, n.

II. On Motions.

Quære as to the costs of motion under the interpleader act, 1 & 2 Will. 4, c. 58. *Northcote v. Beauchamp*, 158.

III. Of New Trial.

1. The plaintiff obtained a verdict, which was afterwards set aside on the ground of misdirection, and a new trial granted, the costs to abide the event. On the second trial, the cause was referred, and the arbitrator ultimately directed that the verdict should be entered for the defendant, each party paying his own costs of reference:—*Held*, that the defendant was only entitled to the costs of the second trial. *Sherlock v. Barnard*, 58

2. It is only where the same party succeeds on both trials, that he is entitled to the costs of both. *Ibid.*

IV. Expenses of Witnesses.

I. On taxation of the defendant's costs, in an action on a policy of assurance, the Prothonotary allowed for the subsistence of the master of the vessel from the time he was subpoenaed till the trial; but refused to allow for his further detention pending a rule for a new trial upon a point to which his evidence was not appli-

cable. The witness was a master in the royal navy, on half-pay; and was not examined on the trial:—The Court refused to direct the Prothonotary to review his taxation. *Mount v. Lar-kins*, 357

2. Where witnesses are called to substantiate charges contained in counts upon which the defendant obtains a verdict, it is in the discretion of the Prothonotary to allow or disallow their expenses, as he may conceive their evidence material to those counts upon which the plaintiff succeeds. *Andrews v. Thornton*, 670

3. The Court approved the allowance, on taxation, of subsistence money for a witness, the captain of a ship, from the service of the subpoena till the time of trial. *Temperley v. Scott*, 601

V. Taxation.

The Court refused to allow an attorney his costs of taxation, where his bill had been reduced by nearly one sixth. *Elwood v. Pearce*, 159

VI. Certificate, under the 6 Geo. 4, c. 16, s. 90.

In an action by the assignees of a bankrupt, the defendant gave notice of his intention to dispute the petitioning creditor's debt, the trading, and the act of bankruptcy. At the trial the cause was referred to arbitration, the defendant undertaking to admit before the arbitrator the debt, trading, and bankruptcy:—*Held*, that the Judge had no power to certify for the costs occasioned by the notice, under the statute 6 Geo. 4, c. 16, s. 90, the cause not having been tried by him. *Barthrop v. Anderton*, 361

VII. Where the debt is recoverable in a Court of Conscience.

See INFERIOR COURT.

VIII. Security for Costs, 429.

And see REGULE GENERALES, XIX.

COVERTURE.

See *BARON AND FEME*.

CRIMINAL CONVERSATION.

See *EVIDENCE*, I. 1.

DEBT.

Upon Matter of Record.

In debt on a judgment the defendant pleaded in bar a release dated in December, 1831, but destroyed by time and accident. Upon an affidavit that the plea was false, the Court gave leave to the plaintiff to sign judgment as for want of a plea. *Smith v. Hardy*, 676

DECEIT.

False Representations as to Solvency.

See *CASE*, II.

DECREE.

OF VICE ADMIRALTY COURT.

I. *Final.*

Semble that a decree of a Vice Admiralty Court, called an "interlocutory," is in effect final. *Obicini v. Bligh*, 477

II. *How enforced.*

And *semble* that such a decree, requiring a party to pay a certain sum, may be enforced in the Courts at Westminster. *Ibid.*

DEVIATION.

See *INSURANCE*, II.

DEVISE.

I. *What Estate Devisees shall take.*

1. The testator, after giving some small pecuniary legacies, devised as follows:—"As to the rest of my estate, the two houses, one in *St. John's Lane*, and the other in *Togwell Court*,

I give to my wife for her life, and after her decease, that in *St. John's Lane* to my daughter, the other between my two sons, to be equally divided; *As to the rest of my estate*, of what nature soever, one third to my wife, and the rest to be divided equally among the three children." The testator left no real property except the two houses above mentioned:—*Held*, that the daughter took a fee in the house in *St. John's Lane*. *Gall v. Esdaile*, 466

2. The testator devised as follows:—"I give and devise my reversion in the messuage in *Aldgate* unto *A. C.* and *M. A.* and their heirs, in trust, as to one moiety, for *N. L.* his heirs, &c., and, as to the other moiety, in trust for such son of mine as shall first attain the age of twenty-one years, and for his heirs, &c. But, in case I shall depart this life without leaving a son, or, leaving such, none shall attain the age of twenty-one, then, as to the last-mentioned moiety, in trust for my daughter *J. N.* &c. But, should I depart this life *without leaving issue*, then I give and devise the entirety of the said messuage, &c., unto the said *A. C.* and *M. A.* and their heirs, in trust for the said *N. L.*, his heirs and assigns for ever." The testator died leaving a daughter who also died at the age of four years:—*Held*, that *N. C.* took under this will only a moiety, and not the entirety under the devise over. *Doe d. Rew v. Lucraft*, 573

And see *ACT OF PARLIAMENT*.

II. *Evidence to explain the Will.*

The testator by his will, duly executed, devised "all his freehold and real estates whatsoever, situate in the county of *Limerick*, and in the city of *Limerick*," to certain trustees therein named, and their heirs. At the time of making his will he had no real estate in the county of *Limerick*,

but he had a small real estate in the city of *Limerick*, and considerable real estates in the county of *Clare*:—*Held*, that parol evidence was not admissible to shew the testator's intention that his real estates in the county of *Clare* should pass by his will. *Miller v. Travers*, 342

III. Revocation of Devise.

1. Where a devise in a will is clear and unambiguous, a revocation of it by a codicil must be expressed in terms equally clear and free from doubt. *Doe d. Hearle v. Hicks*, 759

2. A testator devised to his wife, during her life or widowhood, a copyhold messuage and premises called *P. H.*; and, in the event of her death or second marriage, he directed the trustees to be seised and possessed of the premises upon the same trusts as (regard being had to the nature and quality of the tenure of the said copyhold premises) would best correspond with the uses declared concerning the residue of his real estate. The testator then, after devising certain freehold property in trust for his son and daughter, and their heirs, bequeathed to his wife all his money in the funds during her life or widowhood, and, after her death or second marriage, to such person as should be either tenant for life or in tail of his residuary estate, with a power to her to appoint 500*l.* as therein mentioned; and then gave her absolutely all the ready money which should be in the copyhold house at the time of his decease, with all articles of plate, &c. He then devised all his household goods, plate, furniture, pictures, &c., not thereinbefore bequeathed, to the trustees, in trust for his wife during such time as by virtue of his will she should be entitled to the copyhold mansion and premises; and, after the determination of her estate in the same, in trust absolutely for the person who then, either

as tenant for life or in tail male, should be in the actual possession of his residuary real estates. The will further gave the wife a rent-charge of 300*l.* a year for life charged upon the residue, with a contingent increase of 100*l.* per annum in case of the failure of issue of his son: and devised all the residue of his property to his son. By a codicil, the testator, referring to his will, and reciting the death of his son, devised to the husband of his daughter the freehold estate devised by his will to her, and gave his wife absolutely the additional annuity of 100*l.* per annum, and, revoking the bequest to her of the plate, furniture, &c., in the copyhold house, in lieu thereof bequeathed to her for her own use and benefit absolutely, all his farming-stock, household goods, &c., "and all other his effects which should be in or about his residence at *P. H.* (the copyhold) aforesaid, and usually considered as comprised in and constituting his establishment there." By a second codicil, the testator constituted his wife sole executrix and residuary legatee. By a third codicil he gave her the proceeds and profits of certain shares which he held in the County Fire Office, for her life. And by a fourth—revoking and making void several of the dispositions theretofore made by him in his will and codicils, of all his freehold, copyhold, and personal estate and effects, instead and in the place of such devise, disposition, and bequest thereof, he gave, devised, and bequeathed all and every his freehold, copyhold, and personal estate and effects of every kind and description whatsoever and wheresoever situated, unto his daughter for life; remainder to his grandson, &c.: and he thereby ratified and confirmed the several annuities and donations by him in his will and former codicils bequeathed; and gave to his wife a further annuity of 100*l.*, to be paid with

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the like restrictions as the former ones given her by his will and codicils; thereby in all other respects but what were above mentioned, confirming his will and codicils:—*Held*, that the devise in the will of testator's copyhold messuage, &c., called *P. H.*, was not revoked by the fourth codicil. *Ibid*

DISCONTINUANCE.

1. A rule to discontinue, not acted upon, is no discontinuance. *Ariell v. Barrow*, 581
2. Discontinuance after plea pleaded. 480

DISTRESS.

For Arrears of Annuity.

Replevin for taking the goods and growing crops of the plaintiff below. Cognizance, that *G. T.* being seized for life, by an indenture dated *September*, 1806, granted to *W. H.* an annuity of 166*l.* 2*s.* out of the premises in which, &c., for the term of ninety-nine years, if *G. T.* should so long live, with a clause, that, if the same should be in arrear for twenty-one days, it should be lawful for *W. H.* to enter on the premises and distrain for the arrears, "and the distresses there found to detain, manage, sell, and dispose of in the same manner in all respects as distresses for rents reserved upon leases for years might, were, and ought to be detained, managed, sold, and disposed of, and as if the said annuity was a rent reserved upon a lease for years"—and justifying the taking as a distress for arrears:—*Held*, that the power of distress did not extend to growing crops. *Miller v. Green*, 189

DOUBLE PLEADING.

See *REGUL. GENERALES*, p. 420.

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Regulations for. . . 681

ESTOPPEL.

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EJECTMENT.

I. Title of Lessor.

See *LEASE*, I. 1.

II. Service of Declaration and Notice.

1. Service of declaration and notice in ejectment, where the tenant is not to be found. *Doe d. James v. Roe*, 597
2. On motion for judgment against the casual ejector, the affidavit alleged a service of the declaration and notice upon a servant of the tenant, upon the premises, the tenant being absent; and that the servant had subsequently stated that he had given them to his master:—*Held*, not sufficient. *Doe d. Thomas v. Roe*, 435
4. Recognizance of bail in. 418

ELECTION.

See *PLEADING*, III. 2.

ELISORS.

Appointment of.

Where the sheriffs and coroners are members of a corporate body who sue in such character, the Court will direct the Prothonotary to appoint elisors to whom the process may be directed; and the rule is absolute in the first instance. *The Mayor, &c. of Norwich v. Gill*, 91

ENTRY.

See *PLEADING*, III. 2.

ERROR, WRIT OF.

A *supersedeas* from allowance. 427
Stay of proceedings pending, *Ib.*

ESCAPE.

See *SHERIFF*, 2.

ESTOPPEL.

A mandate was issued by the sheriff of York, directing the bailiff of a

liberty within that county to take the defendant on a *ca. sa.* The defendant was afterwards discharged under the insolvent debtors' act, and the plaintiff appointed assignee of his estate:—*Held*, that the plaintiff was thereby estopped from ruling the bailiff to return the mandate. *Hepworth v. Sanderson*, 64

EVIDENCE.

I. Admissible.

1. In an action for criminal conversation, letters written by the wife to third persons, before the commencement of the adulterous intercourse, are admissible in evidence to shew the general state of feeling and affection between the husband and wife, on the same principle that general conversations are admissible; and such a letter is not to be rejected merely because it contains statements of specific facts which perhaps are not strictly evidence. *Willis v. Bernard*, 384

2. Where a witness, called to prove a particular fact, states on cross-examination, or otherwise, another fact militating against the party calling him, other witnesses may be called on the same side to disprove such other fact; but the whole of his testimony is not necessarily to be rejected. *Bradley v. Ricardo*, 183

3. In trespass for *mesne profits*, it was proved that the defendant held the premises under a written agreement, which was not produced:—*Held*, that parol evidence was not admissible to shew under whom the defendant held. *Doe v. Harvey*, 834

II. Competency of Witnesses.

1. In an action against sureties (the principal debtor having become bankrupt), a general release of the bankrupt and his property will not render the bankrupt a competent witness for

the defendants, they having such a right, in the event of a verdict passing against them, to resort to his estate in the hands of his assignees, in the surplus of which the bankrupt retains an interest. *Perryman v. Sleggell*, 340
2. A release by the bankrupt of his interest in the surplus would, it seems, restore his competency. *Ibid.*

III. Verdict in a former action.

The lessor of the plaintiff recovered judgment in an action of ejectment against one P. Before execution, the defendant came into possession of the premises under P., and occupied for a year, paying rent:—*Held*, that the judgment in the ejectment was evidence against the defendant in trespass for the *mesne profits*. *Doe v. Widdow*, 167

IV. Examination of Witnesses upon Interrogatories.

1. The Court granted a rule (absolute unless cause shewn on the morrow) for the examination of witnesses by the Prothonotary, under the statute 1 Will. 4, c. 22, upon an affidavit that they were about to sail immediately for India. *Pirie v. Iran*, 223

2. The Court refused to grant an order for the examination before the Prothonotary (pursuant to the statute 1 Will. 4, c. 22) of a female witness, upon an affidavit that the cause was set down for trial at the Sittings after Hilary Term, and that the witness was expected to be confined in the month of February or March, and therefore would be unable to attend. *Abbott v. Mason*, 134

3. *Quere* whether pregnancy be a permanent sickness or infirmity, in the contemplation of the statute. *Ibid.*

V. Admissions.

1. By the party.

An admission of the subscription of the underwriter to a policy, does no

FALSE JUDGMENT.

dispense with proof of the agency of the party effecting the insurance. *Palmer v. Marshall*, 161

2. *By an Agent.*

The admission of a pawnbroker's shopman, that his master is in possession of goods, is not admissible in evidence against the latter in an action of detinue, where the goods are not pledged in the ordinary course of the trade, that is, for an amount authorized by the statute 39 & 40 Geo. 3, c. 99. *Garth v. Howard*, 628

And see DEVISE II.—VARIANCE.

EXECUTION.

See REGULE GENERALES, XXI.

EXECUTORS AND ADMINISTRATORS.

I. *What passes to.*

An advowson belongs to a prebendary in right of his prebend, and the church becomes vacant, and the prebendary dies without having presented: *Held*, that the right of presentation belongs to his personal representative. *Mirehouse v. Rennell*, 683

II. *Their Liabilities.*

Quære, whether a judgment obtained in a prize court by the agent of a foreign power, against a native of this country, can be enforced here by the personal representative of such agent? *Obicini v. Bligh*, 477

FALSE JUDGMENT, WRIT OF.

Where a motion is made in a cause removed by writ of false judgment from a court of inferior jurisdiction, the affidavits must be intitled in the cause in error. *Watson v. Walker*, 437

And see *Walker v. Watson*, 674

FINES AND RECOVERIES. 787

FALSE REPRESENTATION.

As to the Solvency of a Trader.

See CASE II.

FEIGNED ISSUE.

See BAIL, III. 2.

FELON.

Wife of, may be bankrupt. 1

FEME COVERTE.

See BARON AND FEME.

FINES AND RECOVERIES.

I. *Levying.*

The caption of a fine in *Scotland* must be taken before advocates or clerks to the signet. Where one of the commissioners was only an attorney of a *Scotch Court*, the fine was not allowed to pass. *Anonymous*, 54

II. *Acknowledgment, Affidavit of.*

The affidavit of the acknowledgment of a fine was taken in *Jamaica*, on paper, and in the margin of the affidavit of the caption it was certified that no parchment could be procured there—the Court permitted the fine to pass, on the officer's engrossing a copy of the affidavit on parchment, and annexing it to the paper writing. *King, plt., Bayley, def.*, 53

III. *Passing.*

1. The Court allowed a fine to pass, where one of the commissioners had omitted to indorse his name on the *dedimus*. *Markham, plt., Bayley, def.*, 62

2. In a recovery, three of the vouches appeared at bar, and the warrant of attorney of the fourth was taken before commissioners in *Jamaica*:—*Held*, that the names of the three former need not appear in the

788 FOREIGN JUDGMENT.

dedimus and warrant of attorney.
Booty, dem., *Cameron*, ten., *Chalmers*, vouch., 57

IV. Amendment of.

1. A recovery may be amended, by transposing the names of the demandant and tenant, although the deed to make a tenant to the *præcipe* was dated on the last day but one of the term in which the recovery was suffered. *Hamilton*, dem., *Farrer*, ten., 43

2. The Court allowed a fine to be amended by inserting land in a parish not named in the deed, it appearing from the description of the property in the deed, that it was the intention of the parties to pass such land, and it being necessary to make up the quantities stated therein. *Anonymous*, 239

3. The Court allowed a recovery suffered in 1780, to be amended by the insertion of three fifths of five messuages instead of *one*, to make it conform with the deed. *Hind*, dem., *Radden*, ten., *Hawkins*, vouch. 515

FOREIGN JUDGMENT.

1. How enforced.

1. An action will not lie in the Courts at *Westminster*, upon a judgment of a foreign court, unless it clearly appear by the transcript of the proceedings that the defendant was subject to the jurisdiction of the foreign court, and that the judgment pronounced against him was final, and for a definite sum. *Obicini v. Bligh*, 477

2. *Seemle*, that a decree of a *Vice-Admiralty* Court, called an "interlocutory," is in effect final; and that such a decree, requiring a party to pay a certain sum, may be enforced in the Courts at *Westminster*. *Ibid.*

3. *Quære*, whether a judgment obtained in a prize court by the agent

INFANT.

of a foreign power, against a native of this country, can be enforced here by the *personal representative* of such agent? *Ibid.*

GENERAL AVERAGE.

See INSURANCE, III.

GROWING CROPS.

See DISTRESS.

GUARANTIE.

Construction of.

1. The plaintiffs sued the defendant upon the following guarantie:—"I hereby guarantee and engage to see you paid for any porter you may send Mr. *A. J.* of this town, until you receive notice to the contrary from me." According to the course of dealing between the plaintiffs and *A. J.*, the latter was to have six months' credit, and then pay by a bill at two months:—*Held*, that an extension of the credit to nine months, and a bill at two months (without notice), discharged the surety. *Combe v. Woolf*, 241

2. And *seemle* that the guarantie would cover a demand for the *casks* in which the porter was sent, upon a declaration properly framed. *Ibid.*

HUSBAND AND WIFE.

See BARON AND FEME.

IMPARLANCE.

Not to be entered on distinct roll. 481

INDICTMENT.

See NUISANCE.

INFANT.

Admission of *prochein amy*. 415

INTERIOR COURT.

I. Jurisdiction.

By the Bath Court of Requests act, 45 Geo. 3, c. lxvii. s. 22, it is provided, that, if any action for any debt recoverable in the said court shall be commenced in any other court, the plaintiff shall not, by reason of a verdict for him, or otherwise, be entitled to any costs:—The Court refused, *before verdict*, to grant a rule to stay the proceedings in a cause so commenced, upon payment of the debt, without costs. *Meredith v. Dean*, 225

II. Removal of cause.

1. Where a motion is made in a cause removed by writ of false judgment from a court of inferior jurisdiction, the affidavits must be intitled in the cause in error. *Watson v. Walker*, 437

2. By the Halifax court of conscience act, 17 Geo. 3, c. xv. s. 30, it is enacted that no plaint, &c., entered in that court for any debt or damages under 5*l*., arising within its jurisdiction, shall be removed by *re. fa. lo., certiorari*, writ of false judgment, or otherwise howsoever. The defendant having sued out a writ of false judgment to remove a plaint, on the ground that the original debt exceeded 5*l*.—The Court set it aside, with costs. *Walker v. Watson*, 674

INQUISITIONS.

1. May be taken out of the office, to obtain writ of execution. 681

2. The attorney or agent to return them the same day. 682

INSOLVENT DEBTOR.

I. Jurisdiction of the Insolvent Court.

The Court refused to order a prisoner brought up under the compulsory clauses of the Lords' act to

assign his property, it appearing that a petition filed by him in the insolvent debtors' court remained for hearing in that court. *Evans v. James*, 309

II. Authority of the Assignee.

A mandate was issued by the sheriff of York, directing the bailiff of a liberty within that county to take the defendant on a *ca. sa.* The defendant was afterwards discharged under the insolvent debtors' act, and the plaintiff appointed assignee of his estate:—*Held*, that the plaintiff was thereby estopped from ruling the bailiff to return the mandate. *Hepworth v. Sanderson*, 64

III. After-liability of Insolvent.

One who is discharged under the insolvent debtors' act, 7 Geo. 4, c. 57, is not exonerated from the claim of a surety on a promissory note which became due before the insolvent presented his petition, but which the surety was not called on by the creditor to pay until after the discharge of the principal. *Powell v. Eason*, 68

IV. Voluntary Assignment.

1. The word "voluntarily" in the 7 Geo. 4, c. 57, s. 82, is used to denote either an assignment made without such valuable consideration as is sufficient to induce a party acting really and *bona fide* under the influence of such consideration, or an assignment made in favour of a particular creditor spontaneously, and without any pressure on his part to obtain it. *Arnell v. Bean*, 151

2. *B.* and *P.* were creditors of *A.* to a considerable extent, and *B.* advanced to *A.* the further sum of 70*l*. to induce him to assign over his property to them as security, as well for the 70*l*., as also for their debts: no fraud being suggested—*Held*, that this was a purchase of a security by

the further advance of the 704. and therefore an assignment not voluntary within the meaning of the 7 Geo. 4, c. 57, s. 32. *Ibid.*

INSPECTION OF DOCUMENTS.

See PRACTICE, XIV.

INSURANCE.

I. Concealment, when material.

Semble that the information as to the time of sailing of ships from foreign ports, contained in the foreign lists filed in the inner room at Lloyd's, does not dispense with the necessity of the assured disclosing to the underwriter at the time of insuring a letter received by him from his correspondent or the captain, announcing his intention to sail the next day, where the knowledge of that fact becomes material. *Ekton v. Larkins*, 328

II. Deviation, and Variation of Risk.

1. A policy was effected on a yacht "at and from Bristol to London."—*Held*, that the risk attached immediately on the execution of the policy; and that a delay of four months in the sailing of the vessel was a material variation of the risk, and avoided the policy. *Palmer v. Marshall*, 161

2. On the 28th of January the defendant insured a yacht of the plaintiff, in the usual terms, at and from Bristol to London. The yacht did not sail from Bristol till the 19th of May. In an action for a total loss, the vessel having been run down in the course of her voyage.—*Held*, that this delay in the sailing of the yacht, unaccounted for by the plaintiff, was such an unreasonable delay as to avoid the policy; the risk of the insurer being thereby materially increased. *Palmer v. Marshall*, 164

3. On the 28th of February, 1824, a policy was effected (on freight valued) upon the ship *Aquila*, "at and from

Singapore and Batavia, both on either, to the ships port or parts of discharge in Europe;" with liberty "to sail to, touch, and stay at any ports or places whatsoever and wheresoever, particularly at the Cape of Good Hope, St. Helena, or elsewhere, to load, unload, and reload goods and passengers, or otherwise, or for all or any other necessary purposes whatsoever." The ship sailed from London in the beginning of September, 1823, and arrived at Singapore on the 30th March, 1825. In an action on the policy, for a total loss, the jury returned a special verdict, in which, after setting out particular instances of delay in the course of the voyage on the part of the captain, they found "that there was unreasonable and unjustifiable delay between the making of the policy and the commencement of the risk intended to be insured against:"—*Held*, that such unreasonable and unjustifiable delay on the part of the assured in commencing the voyage insured, was in the nature of a deviation, and amounted to such an alteration of the risk insured against as to discharge the liability of the underwriters upon the policy. *Mount v. Larkins*, 165

III. Stranding.

A policy of insurance on wheat from London to Dunkirk contained the usual memorandum by which coast, &c., were warranted free from average, unless general, or the ship were stranded. On the ship's arrival at Dunkirk, the harbour of which is a tide-harbour, she was, by the direction of the harbour master, moored fore and aft to the quay in a particular spot, with a running tackle from her mast-head affixed to a post on the shore, to prevent her falling over on the ebbing of the tide. The rope of the running tackle breaking, the vessel fell on her side, and was injured

by coming in contact with some hard substance in the bed of the harbour, and the cargo damaged. It appeared, however, that the vessel fell precisely in the spot in which it was intended to settle:—*Held*, that this was not a stranding within the meaning of the policy. *Kingsford v. Marshall*, 657

IV. Agency of Broker.

An admission of the subscription of the underwriter to a policy, does not dispense with proof of the agency of the party effecting the insurance. *Palmer v. Marshall*, 161

INTERPLEADER.

See PRACTICE, XI.

JUDGMENT.

Admissibility of, in Evidence.

See EVIDENCE, III.

JURY PROCESS.

Time for delivering to the Sheriff.

The jury process must be sent to the sheriff, in the case of common jurors, ten days, and, in case of special jurors, three days at the least before the commission day at the Assizes. *Charlton v. Burfit*, 450

LANDLORD AND TENANT.

I. Relation of.

The defendant held under a lease which expired at Lady-day, 1829. At Midsummer-day following, he paid a quarter's rent and quitted the premises, giving up possession to one L., who continued to occupy, and paid rent to the plaintiff for two years. In an action for use and occupation, for arrears subsequently accruing, it was left to the jury to say whether or not the landlord had accepted the new tenant. They found that he had, and accordingly returned a verdict for the

defendant. The Court refused to disturb it. *Woodcock v. Nuth*, 317

II. Rights and Liabilities of Landlord.

1. The Landlord, in case of an execution against his tenant, is entitled to a full years' rent, although he had, on former occasions, voluntarily deducted a portion of such rent. *Williams v. Lemsey*, 92

2. Lessee making an underlease, the law implies a duty in him to indemnify his under-tenant from the consequences of the non-performance of his covenants with the superior landlord. *Hancock v. Caffyn*, 521

And see EVIDENCE, I. 3., III.—LEASE.

LEASE.

I. What shall amount to a Lease.

1. By a memorandum of agreement dated the 21st September, "A. and B. agreed to let, and C. agreed to take, all that house and premises, in the unfinished state they are now in, situate &c., for the term of sixty years, or thereabouts, being the whole term that they the aforesaid A. and B. have the same premises leased unto them, at the yearly rent of 525*l.* payable quarterly; on the four most usual days of payment of rent; the first payment to be made for the half quarter at Christmas next. The said C. also agrees to insure the premises in 5,000*l.* The said lease and counterpart to be prepared by the attorney of the said A. and B., and at the expense of C., and to contain all the clauses, covenants, and agreements that they the said A. and B. have entered into and agreed upon in the lease granted unto them of the aforesaid premises. C. to have the benefit of the insurance which has been lately paid." C. was let into possession under the memorandum:—*Held*, that it amounted to a present demise, conveying to C. an immediate inter-

est in the premises, in respect of which he might maintain ejectment. *Doe d. Pearson v. Ries*, 259

2. The defendant held premises under a lease from one J. H., at a certain rent; and entered into an agreement with one N. for the sale of all the household furniture, &c. on the premises for a certain sum, to be paid by instalments—covenanting, on payment of the whole of the purchase-money, to demise the premises to N. for twenty-five years; the lease to contain the like covenants on the part of N. as were contained in the lease under which the defendant held. The agreement also contained a covenant that N. should, in the mean time, and until such lease should be granted, pay the rent and perform all the covenants which would be to be performed by him in case the lease was actually granted: with a power of distress for non-payment of the rent. N. was let into immediate possession under this agreement, and paid rent:—*Held*, that the agreement amounted to a present demise. *Hancock v. Caffyn*, 521

II. Construction of.

In case of obstructing a right of way, the plaintiff proved an uninterrupted user for seventeen years. The defendant claimed a right to the soil under a subsequent demise, containing (amongst others) a covenant that the lessee should contribute a rateable proportion of the expense of repairing the fences, paths, ways, &c., used in common with the occupiers of other premises near or adjoining thereto, belonging to the lessor. It appeared that the passage over which the plaintiff claimed a right of way was the only one to which this covenant could apply:—*Held*, that the right of way in the plaintiff was not inconsistent with the demise to the defendant. *Oakley v. Adamson*, 510

LETTERS.

From the wife to a third person, receivable in an action for criminal conversation, to shew the general sentiments of the wife towards her husband. *Willis v. Bernard*, 584

LIMITATIONS, STATUTE OF.

I. What a sufficient Acknowledgment to take a Case out of.

To take a case out of a statute of limitations, the plaintiff produced a deed whereby the defendant had assigned to the plaintiff and one C. the whole of his property, in trust to secure 6s. 8d. in the pound to his creditors, in which deed was a recital that the defendant *was indebted to the plaintiff* and the other creditors whose names were thereunder written in the several sums set opposite their respective names in the schedule annexed to the deed. The deed also contained a proviso that "the deed and all the covenants therein" should be void, unless all the creditors signed by a given day. The deed was not executed by all the creditors; neither was the plaintiff's name or the amount of his debt inserted in the schedule; nor did he execute the deed:—*Held*, that this was not a sufficient acknowledgment to take the case out of the statute: and that the amount of the plaintiff's debt could not be supplied by parol evidence, or by the admission of counsel at the trial. *Kennett v. Milbank*, 102

II. Effect of Payment of Interest.

Payment of interest within six years by one of several makers of a joint and several promissory note takes the case out of the statute of limitations as against all, notwithstanding the statute 9 Geo. 4. c. 14. *Wright v. Hudson*, 442

MORTGAGE.

LOARDS' ACT.

See PRISONER.

MANOR.

See COPYHOLDS.

MARINER.

See COSTS, IV.

MASTER AND SERVANT.

See EVIDENCE, V. 2.

MEMORANDA, 222, 435.

MESNE PROCESS.

See PRACTICE, I. 1, 3, 4, 5.

MESNE PROFITS.

See EVIDENCE, I. 3.—III.

MISNOMER.

In Title of Dignity.

See PLEADING, II. 1.

And see REGULE GENERALES, IX.

MISREPRESENTATION.

As to the Solvency of a Trader.

See CASE, II.

MONEY PAID INTO COURT.

See ARBITRATION, I. 2.

MORTGAGE.

Stamp.

A mortgage deed to secure 5,000*l.* and interest, together with all expenses incurred in the execution of the powers of sale, &c., contained in the deed, and interest thereon, does

NUISANCE.

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not require a 2*5l.* stamp. *Doe d. Scruton v. Snaith,* 230

NAVIGATION.

Obstruction of.

See NUISANCE.

NEW TRIAL.

See COSTS, III.—REGULE GENERALES, XV.

NEXT PRESENTATION.

See ADVOWSON.

NON-PROS.

See PRACTICE, V. 2.—VII. 1.

NOTICE.

I. *Of Bail.*

See BAIL, II. 1, 2.

II. *Of Declaration.*

Form of . . . 420, 421

And see PRACTICE, III. 2, 3.

III. *Of Trial.*

See PRACTICE, VIII.

And see REGULE GENERALES, XIII.—XV.

NUISANCE.

Obstructing a Navigation.

An indictment against the proprietors of land adjoining a river and brook, charged the defendants with erecting mounds and embankments on their banks, whereby the waters of the river were wrongfully forced against an aqueduct belonging to the prosecutors, the proprietors of a canal, to the injury thereof. The jury found by a special verdict, that the canal was raised by artificial embankments, and was carried across the

river by means of an aqueduct of one arch; that the embankments, called fenders, were made for the purpose of preventing the waters of the river and brook from overflowing the adjoining lands; that the fenders had been from time to time raised, as occasion required, by the defendants; that, before the banks of the river and brook were raised, the water of the river was, in times of flood, frequently penned back by the brook, and, flowing over its north bank, inundated the low lands to the extent of many hundred acres, doing much mischief; that, by reason of the embankments on which the canal was raised, and of the want of sufficient banks under the same, the flood-water had been penned back on the land higher up the river than the point of its junction with the brook, and had broken down the north bank of the river, and, after inundating the adjoining lands, flowed down to the three arches; that the improved drainage of the country higher up the river had occasioned a greater quantity of water to flow down the river, to the aqueduct than used to flow down for several years immediately after the aqueduct was built, but that the aqueduct was still of sufficient capacity for the passage of the waters of the river at all times except in times of high floods; and that the raising of the fenders on the banks of the river and brook, had occasioned so much greater quantity of water, in times of high floods, to flow to and against the aqueduct than did or could flow to and against the same for several years immediately after the aqueduct was built, and had rendered the aqueduct insufficient for the passage of the waters of the river in times of high floods, and had thereby greatly endangered the canal; but that the fenders had not been raised more than was necessary to protect and prevent the said lands from being

inundated. Judgment having been given for the Crown, in the Court of King's Bench, the Court of Exchequer Chamber, awarded a *reversal de novo*, on the ground, that the special verdict did not state with sufficient certainty what was the real cause of the penning back of the water in times of flood, nor whether the raising the banks by the defendants had a legal and justifiable commencement, nor what was the rightful cause of the flood-water—holding that, in order to show the defendants guilty of the offence charged, it ought to appear distinctly upon the special verdict, that the raising of the fenders was not an accustomed and rightful usage; that it was not sanctioned by ancient usage, or by the ordinary right which every man has, *prima facie*, to protect his own property, provided he can do so without injury to others; and that the course which the flood-water was stated to have taken was the ancient and rightful course which it ought to take; and further, that it ought to have been left in doubt whether the embankments and the aqueduct had not wrongfully turned back more water upon the low lands of the defendants than was formerly collected in times of flood; or whether the banks of the river and brook had been raised without any necessity, and not in self defence against the consequences of the construction of the embankments and aqueduct. *Trafford v. The King*, 401

SPECIAL VERDICT

PARTICULARS OF DEMAND.

I. Requisites of.
 1. An error in a date, or other inaccuracy in a bill of particulars, will not warrant a nonsuit, unless the particular be so framed as to be reasonably calculated to mislead the defendant. *Harrison v. Wood*, 136

2. A misdescription in the particular of the debt sought to be recovered, will not warrant a nonsuit, unless the defendant is misled thereby. *Lambert v. Hoff*, 597

II. *Annexation to the Record.*

The rule of *Trinity*, 1 W. 4, which requires the particular of demand to be annexed to the record, dispenses with proof of its delivery. *Murphy v. Smith*, 327

III. *Time for Pleading after.*

See *REGULÆ GENERALES*, XII.

PARTNERS.

I. *What constitutes a Partnership.*

In 1880, *W.* advanced 24,000*l.* to *J. C. S.* and *K. S.* traders, and jointly with them executed a deed by the express terms of which a partnership stock was created in which they had all as joint property. *W.* was not to have any definite aliquot proportion of the profits, but was to have an account of the profits as between themselves, each as respective 2,000*l.* or 2400*l.* a year, as the case might be, out of the profits. *W.*'s name never appeared to the world as a partner: *Held*, that *W.* was a partner in the concern. *Ex parte Church*, 615

PAUPER.

Omitting to proceed to trial pursuant to notice. 431

PAWN-BROKER.

See *ETTERICK*, VJ21774

PAYMENT OF MONEY INTO COURT.

See *ABERRATION*, I. 100
PENAL ACTIONS.
Leave to compound. 439

PERJURY.

See *AFIDAVIT*, II.

PERSONAL REPRESENTATIVE.

See *EXECUTORS AND ADMINISTRATORS*.

PLEADING.

I. *Declaration.*

1. It is no ground of special demurrer, that the *venue* stated in the margin of the declaration is not respected in the body. *Duncan v. Paschger*, 408

2. Plaintiffs declared as assignees of a bankrupt, concluding as follows:—“wherefore the said plaintiffs, assignees as aforesaid, say they are injured, &c.”—*Held* good; on special demurrer, as the words “assignees as aforesaid,” might be rejected as surplusage. *Cobbett v. Cochran*, 55

3. In trustees against A.B. and C. for breaking and entering the plaintiff's close, the doer in quo was described in the declaration as abutting “towards the north on a close of the said defendant.” The evidence was, that it abutted on a close of *M. O. H.*, no variance; but a mere ambiguity. *Walford v. Anthony*, 126

4. The plaintiff declared, that one G.K. was indebted to the firm of B. & S.; that the plaintiff had been appointed by the Court of Chancery receiver of the debts and moneys due to the firm, by means whereof G.K. became liable to pay to the plaintiff, as such receiver, the debt so by him due to the firm, when thereunto required; and that, in consideration that the plaintiff, as such receiver, at the request of the defendant, would forbear to sue G.K. for the debt for the space of two months, the defendant undertook to pay the amount to the plaintiff at the expiration of that

period, should it be then unpaid:—*Held*, on motion in arrest of judgment, that the declaration disclosed a sufficient authority in the plaintiff to sue as receiver; and also contained a sufficient allegation of *C. K.*'s liability; and that there was a good consideration for the defendant's promise, as the plaintiff might have sustained a detriment by forbearing to sue *C. K.* without the authority of the firm. *Willatts v. Kennedy*, 35

5. In an action against a witness for not obeying a subpoena:—*Held*, that the omission of an averment in the declaration that the plaintiff had a good cause of action against the defendant in the original suit, could not be taken advantage of in arrest of judgment. *Masterman v. Judson*, 367
And see *REGULÆ GENERALES*, IX.

II. Pleas.

In Abatement.

1. A plea in abatement, that the defendant, sued as a common person, was a *Scottish* peer, most distinctly and positively allege him to have been a peer at the time of suing out the writ; the mere statement of circumstances which amount only to evidence of peerage will not suffice. *Digby v. Alexander*, 569

2. To a declaration against the defendant describing him as the Right Honourable *A. A.*, Earl of *S.*, having privilege of parliament, the defendant pleaded in abatement, that he had privilege of peerage, but not privilege of parliament:—*Held*, ill on demurrer, for that the words in the declaration, "having privilege of parliament," were immaterial and unnecessary and might be rejected as surplusage. *Cantwell v. The Earl of Stirling*, 587

In Bar.

In trespass for breaking and entering the plaintiff's close, the defendant

pleaded that he was the owner of a certain barn, &c., then standing and being in and upon the close of the plaintiff in which &c., wherefore he entered to pull down, remove, and take them away, &c.:—*Held*, ill, on demurrer, the plea not shewing how the barn, &c., came upon the close of the plaintiff, or that they were not attached to the freehold. *Anthony v. Haney*, 300

And see post—and *REGULÆ GENERALES*, X.

III. In Replevin.

1. In replevin the defendant avowed for rent due and in arrear at Martinmas, "to wit, the 25rd November:—*Held*, that Martinmas must be taken to mean New Martinmas, and that the subsequent words, "to wit, the 25rd November," being surplusage, could not be taken to explain that Old Martinmas was intended. *Smith v. Walton*, 380

2. Replevin for taking the goods and growing crops of the plaintiff below. Cognizance, that *G. T.*, being seized for life, by an indenture dated September, 1806, granted to *W. H.* an annuity of 100*l.* out of the premises in which &c., for the term of ninety-nine years, if *G. T.* should so long live, with a clause, that if the same should be in arrear for twenty-one days, it should be lawful for *W. H.* to enter on the premises and distrain for the arrears; and justifying the taking as a distress for arrears. Plea, that, before the making of the indenture mentioned in the cognizance, viz., in May, 1806, the said *G. T.*, by another indenture, in consideration of 2,000*l.*, granted to *W.* an annuity of 41*l.* 1*8s.* out of the said premises in which &c., for ninety-nine years; and for the better securing the said annuity, for the considerations in the indenture mentioned, and of 10*l.* paid to *G. T.* by *R. G. T.* granted, bar

gained, sold, and demised to *F.* the said premises in which &c., for ninety-nine years:—*Held*, that this plea was no bar to the cognizance, there being no allegation of an entry under the deed by *F.*, or by any claiming under him, nor any election by *F.* that the deed should enure by way of bargain and sale. *Miller v. Green*, 199

IV. Setting aside Pleas.

See PRACTICE, IV: 2.

PLURIES CAPIAS.

Not stamped for exigent. 429

PONE.

The allegation of cause at the end of the writ of *pone* is mere matter of form, and cannot be traversed. *Talbot v. Binns*, 148

POSTEAS.

1. May be taken out of the office, to obtain writ of execution. 681
2. The attorney or agent to return them the same day. 682

POWER.

1. Of Appointment.

By a marriage settlement, certain lands were conveyed to trustees to the use of the husband for life, with power of appointment to male issues, remainder to the trustees to preserve contingent remainders; remainder, in default of appointment, to the sons successively in tail general; remainder to the right heirs of the husband. After the marriage the husband became bankrupt, and his lands were conveyed by the commissioners to his assignees, by deeds of bargain and sale, who afterwards sold them, subject to the contingencies in the deed of settlement. The husband afterwards executed a deed of appoint-

ment to his son in fee, after the determination of his own life estate:—*Held*, that the son took no estate under the appointment, but that, under the marriage settlement, he took an estate tail in remainder, expectant on the determination of the life estate of his father. *Badham v. Mee*, 14

II. Of Distress. See DISTRESS.

PRACTICE.

I. Process.

1. Where the sheriffs and coroners are members of a corporate body who sue in such character, the Court will direct the Prothonotary to appoint clerks to whom the process may be directed; and the rule is absolute in the first instance. *The Mayor, &c., of Norwich v. Gill*, 91

2. The allegation of cause at the end of the writ of *pone* is mere matter of form, and cannot be traversed. *Talbot v. Binns*, 148

3. A petitioning creditor attending the commissioners for the purpose of watching the progress of the commission and of proposing himself as an assignee, is protected from arrest, *cum de, curando, et redeundo*: and it is for the party who seeks to oust him of his privilege to shew an unreasonable delay or an improper deviation from his course of business. *Selby v. Hills*, 263

4. The defendant being arrested, obtained his discharge by giving the plaintiff security for the debt. The security proving very inadequate, the plaintiff (without restoring it) again arrested the defendant for the same cause:—The Court ordered the bail bond to be cancelled, with costs, no fraud being imputed to the defendant. *Wilson v. Hamer*, 120

5. The mere fact of the defendant having on three occasions voted in the character of a Scotch peer, at elections

of representative peers of Scotland, was held sufficient to entitle him to be discharged from arrest, although it was sworn that his title had never been otherwise recognised. *Digby v. The Earl of Stirling*, 116.

II. *Apparatus.*

1. To process by original, 410.
2. The appearance must be entered in the county into which the original writ issues, though the service be of an alias into another county. *Brown v. McCulloch*, 679.

III. *Bail.*

1. An undertaking by an attorney to give a bail-bond to the sheriff is contrary to the statute 25 Hen. 6, c. 10, and void. *Denby v. Knight*, 359.
2. The rules of *Trinity*, 1 Will. 4, as to bail, apply equally to town and country bail. *Anonymous*, 296.

3. Where the notice of bail is merely informal, and not an absolute nullity, the plaintiff cannot take an assignment of the bail-bond. *Bell v. Fisher*, 618.

4. An omission to describe the bail, in the notice, as housekeepers or freeholders, as required by the rule of *Trinity* term, 1 Will. 4, can only be objected to when the bail come up to justify. *Id.*

5. On motion to cancel a bail-bond, on the ground that the defendant (a bankrupt) had since obtained his certificate, it being suggested that the certificate had been obtained by fraud, the Court (the parties consenting) directed an issue to try that fact. *Duncan v. Everett*, 321.

III. *Declaration.*

1. The motion under the 49th rule of *Hilary*, 1 Will. 4, that sticking up a notice of declaration in the office may be deemed good service, where the defendant's residence is unknown, is absolute in the first instance. *Bridgman v. Austin*, 526.

2. The notice of declaration (whether the declaration be filed absolutely or conditionally) must state the nature of the action. *Cook v. Johnson*, 116.
3. Notice of a declaration in case, where the declaration filed was in debt, was held to be irregular, and the proceedings were set aside. *Id.*

4. Service of declaration and notice in ejectment, where the tenant is not to be found. *Doe v. Jones v. Roe*, 697.

5. On motion for judgment against the casual ejector, the affidavit alleged a service of the declaration and notice upon a servant of the tenant, upon the premises, the tenant being absent, and that the servant had subsequently stated that he had given them to his master. *Held*, not sufficient. *Doe v. Thomas v. Rhee*, 435.

6. No rule to plead after amendment of declaration. *Id.*

7. Declaring *de bene esse*. *Id.*

IV. *Plea.*

1. Time for Pleading. A defendant is entitled to four days' time for pleading after a judgment of respondent *ouster*. *Cantwell v. The Earl of Stirling*, 365.

2. *And see* REGULE GENERALES, XI.

3. *Selling aside.* In debt on a judgment, the defendant pleaded in bars a release dated in December, 1831, but destroyed by time and accident. Upon an affidavit that the plea was false, the Court gave leave to the plaintiff to sign judgment, as for want of a plea. *Smith v. Hardy*, 1676.

4. *Particulars of Demand.*

1. The rule of *Trinity*, 1 Will. 4, which requires the particulars of demand to be annexed to the record,

dispute with proof of its delivery. *MacCarthy v. Smith*, 227

(2.) The Court set aside a judgment of non-pros. which had been signed by the defendant for the non-delivery of particulars of the plaintiff's demand pursuant to a Judge's order. *Sutton v. Clarke*, 271

(3.) An error in a date, or other inaccuracy in a bill of particulars, will not warrant a nonsuit, unless the particular be so framed as to be reasonably calculated to mislead the defendant. *Harrison v. Wood*, 536

A. A misdescription in the particular of the debt sought to be recovered, will not warrant a nonsuit, unless the defendant is misled thereby. *Lambirth v. Roff*, 597

VI. Jury and Jury Process.

1. The jury process must be sent to the sheriff, in the case of common jurors, ten days, and, in the case of special jurors, three days, at the least before the commission day, at the Assizes. *Charlton v. Byfitt*, 450

2. The Court refused to discharge a rule for a special jury on the mere ground of a delay in striking the special jury from Hilary till Michaelmas Term. *Andrews v. Thornion*, 132

3. The Court refused to discharge a rule for a special jury in a *Middlesex* cause, on the ground that the rule had not been served, or the cause marked as a special jury cause two days before the adjournment day of the last Sittings, as required by the rule of Court (*Term. 52 Geo. 3*): but they directed the cause to be set down for trial on the first day fixed for taking special jury causes, upon the terms of the defendant's giving judgment of the term, and bringing up certain witnesses (his servants) subpoenaed by the plaintiff. *Thorne v. The Marquis of Londonderry*, 62

VII. Discontinuance.

1. The plaintiff's attorney being

served with a rule to declare, in order to gain time, took out a rule to discontinue on payment of costs, and after taxation delivered a declaration in debt, the action being *assumpsit*. The defendant's attorney signed judgment of non-pros. The Court refused to set aside the judgment, except on payment of all the costs incurred by the defendant. *Arial v. Barnett*, 581

(2.) Discontinuance after plea pleaded. 439

VIII. Notice of Trial.

If issue is joined early enough in a term to enable the plaintiff to give notice of trial for the Sittings after the term, although he is not compellable to do so, yet if he do give notice he is bound by it; and, if he omit so to try accordingly, the defendant may move for judgment as in case of a nonsuit in the following terms. *Howell v. Penkett*, 855

IX. Judgment.

See *Rescued Goods*, XVII.

Nunc pro tunc.

The defendant obtained a verdict in December, 1829. In the following term the plaintiff obtained a rule nisi for a new trial, which rule the Court afterwards directed to be suspended, to await the issue of another cause which involved the same point. The defendant died in November, 1830. The Court, after the lapse of two years and a half from the date of the verdict, allowed the judgment to be entered up *nunc pro tunc*. *Key v. Goodwin*, 620

X. Set-off.

By an order of *Nisi Prius*, it was agreed that a verdict should be entered for the plaintiff for nominal damages and the costs of the action, and that the plaintiff should pay the defendant a sum of 70*l.* due to her

from him. The Court permitted the 70*l.* to be set off against the costs in the cause. *Newton v. Newton*, 366

2. The plaintiff sued out a *fi. fa.* against Lord *E.*, on a judgment entered up for 2,580*l.* Lord *E.* having previously assigned all his effects to trustees for the benefit of his creditors, the sheriff (under an indemnity from the trustees) returned *nulla bona*. The plaintiff sued the sheriff for a false return. The sheriff obtained a verdict:—The Court refused to allow the plaintiff's judgment to be set off against the costs of the action against the sheriff. *Hewitt v. Pigott*, 122

3. The plaintiff obtained judgments against the defendant in two actions in this Court, and the defendant obtained a judgment against the plaintiff in the Court of *King's Bench*:—*Held*, that the defendant, upon acknowledging satisfaction for the amount of the judgments in this Court on the judgment she had obtained against the plaintiff in the Court of *King's Bench*, might enter satisfaction on the judgment-rolls in the two actions in this Court, although the plaintiff had died, and more than two years had elapsed before judgment had been entered up against her in the Court of *King's Bench*, the verdict having been obtained in her lifetime, subject to a reference, and a rule *nisi* to reduce the damages awarded by the arbitrator being pending at the time of her death:—*Held*, also, that the judgments for the plaintiff in this Court might be set off against the judgment for the defendant in the Court of *King's Bench*, although the plaintiff's attorney had administered to her effects as a judgment creditor, and sued out a writ of *elegit* against the defendant, and commenced ejectments to enforce it:—*Held*, also, that the attorney had no lien for his costs upon the judgments in this Court;

and, he having refused to allow them to be set off against the judgment in the *King's Bench*, the Court ordered him to pay the costs of the application: *Bridges v. Smyth*, 93

4. No set-off to prejudice attorney's lien, 429

XI. Interpleader.

1. Practice under the interpleader act. *Parker v. Booth*, 156
Northcote v. Beauchamp, 158

2. *Quære* as to costs of motion under the interpleader act. *Northcote v. Beauchamp*, 158

XII. Payment of Money into Court.

See ARBITRATION, I, 2—REGULATIONS GENERALES, XIII.

XIII. Examination of Witnesses by the Prothonotary.

See EVIDENCE, IV.

XIV. Inspection of Documents.

1. An annuity deed was prepared by one *R.*, as agent of both the grantor and the grantee, and, there being no counterpart, was left in the hands of *R.*, who received, and for several years paid over to the grantee the amount of the annuity. *R.* ultimately absconded, and the deed came into the possession of the grantor on his redeeming the annuity two years after it was granted. In an action by the grantee against the grantor for arrears of the annuity, the Court permitted the former to inspect and take a copy of the deed, to enable him to declare thereon, although it was sworn by the latter that *R.* was the agent of the grantee alone. *Deverner v. Bouverie*, 29

2. The Court refused to allow the plaintiff to inspect a document in the hands of the defendant, alleged by his (the defendant's) attorney to be signed by the plaintiff, and to afford a per-

PRACTICE.

fect defence to the action, upon an affidavit of the plaintiff, that, if such document existed, and purported to be signed by him, the signature was a forgery. *Jessel v. Millingen*, 605

3. Inspection of court-rolls, 480

XV. Venue.

Effect of variance in. 420

Changing.

1. The Court refused to change the venue in an action on a policy of insurance at and from *Bristol to London*, on the ground that nearly all the witnesses resided in *London*—the cause being ready for trial at the approaching Assizes, *Palmer v. Marshall*, 252

2. The Court would not allow the venue to be changed from *London* to the city of *Norwich* on the usual affidavit: it is necessary for the defendant to state some special ground for the application. *Scruton v. Dawson*, 92
And see p. 430.

XVI. Incidental Proceedings.

1. The Court refused to open a rule that had been made absolute without cause shewn, upon an affidavit by the attorney alleging that he had understood the rule to be absolute in the first instance. *Charlton v. Burfill*, 450

2. The Court refused to grant a new trial on the ground that the cause had been called on in the absence of the defendant's attorney, and that the plaintiff's case had been gone into, no one appearing on the other side—the affidavits on which the motion was founded not stating that any briefs had been prepared for counsel. *Gwill v. Crawley*, 229

3. The landlord, in case of an execution against his tenant, is entitled to a full year's rent, although he had, on former occasions, voluntarily de-

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ducted a portion of such rent. *Williams v. Lewsey*, 92

4. By an order of *Nisi Prius*, the cause and all matters in difference between the parties were referred to the arbitration of a surveyor, who found, that, on the balance of accounts between the plaintiff and defendant, the latter had overpaid the former: 244.—The Court refused to grant an attachment against the plaintiff, for non-payment of the sum awarded. *Thornton v. Hornby*, 42

XVII. Removal of Cause.

See *INFERIOR COURT*.

The allegation of cause at the end of the writ of *pono* is mere matter of fact, and cannot be traversed. *Talbot v. Binns*, 168

XVIII. Setting aside and Staying Proceedings.

On bail-bond. 419.

And see ante, V. 2.—VII.—*INFERIOR COURT*, I.—II. 2.—*REGULE GENERALES*, VII.

PRESENT DEMISE.

See *LEASE*, I.

PRESENTATION.

See *ADVOWSON*.

PRINCIPAL AND AGENT.

1. The defendant consigned to the plaintiff, a salesman, a load of hay to sell on his account. The plaintiff sold the hay to one *S.*, and remitted the price to the defendant. In the mean time the defendant's servant, who had been directed by the plaintiff to carry the hay to *S.*, was defrauded of it by a swindler:—*Held*, that the plaintiff was entitled to recover back the sum remitted. *Gingell v. Glasscock*, 125

2. The admission of a pawn-broker's shopman, that his master is in possession of goods is not admissible in evidence against the latter in an action of detinue, where the goods are not pledged in the ordinary course of the trade, that is, for an amount authorized by the statute 39 & 40 *Geo.* 3, c. 99. *Garth v. Howard*, 628

3. It was agreed between the plaintiff and T., that T. should sell goods on commission for the plaintiff, receiving a commission of 5*l.* per cent. "on all goods sold or orders executed," and that he should draw his commission monthly; the plaintiff to be responsible for bad debts:—*Held*, that T. was entitled to commission notwithstanding the sales were unproductive, although it was proved that by the custom of the trade commission was not payable upon bad debts. *Bower v. Jones*, 140

PRISONER.

I. *Proceedings against.*

See *REGULÆ GENERALES*, IX.—XXIII.

II. *Brought up under the compulsory clauses of the Lords' Act*, 32 *Geo.* 2, c. 28, ss. 16, 17.

1. A motion to bring up a prisoner under the compulsory clauses of the Lords' act, cannot be made so late as the seventh day of term. *Acraman v. Harrison*, 240

2. The Court refused to order a prisoner brought up under the compulsory clauses of the Lords' act to assign his property, it appearing that a petition filed by him in the insolvent debtors' court remained for hearing in that court *Evans v. James*, 309

PRIVILEGE.

I. *From Arrest.*

See *PRACTICE*, I. 3, 4, 5.

REGULÆ GENERALES.

II. *Parliament.*

See *PLEADING*, II. 2.

III. *Of Peerage.*

See *PLEADING*, II. 1, 2.

PROCESS.

Affidavit of service of. 415

And see *PRACTICE*, I.—*REGULÆ GENERALES*, IV.

PROCHEIN AMY.

Admission of, 415

PROMISSORY NOTE.

See *SURETY*.

QUANTUM MERUIT.

See *ASSUMPSIT*.

QUARE IMPEDIT.

See *ADVOWSON*.

RECEIVER.

As to the right of a receiver appointed by the Court of *Chancery* to sue for debts, See *PLEADING*, I. 4.

RECOVERY.

See *FINES AND RECOVERIES*.

REGULÆ GENERALES.

I. *Authority to Prosecute or Defend.*

Entry of warrant to sue or defend 415
Admission of prochein amy *ib.*

II. *Affidavit.*

Of service of process *ib.*
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V. Bail.

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More than two bail irregular, without leave	ib.
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Liability of bail	ib.
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Nor till four days in town, and eight days in country causes from appearance day	ib.
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IX. Declaration, and Time for.

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XIV. Trial, and Notice thereof.

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RELEASE.

1. In an action against sureties (the principal debtor having become bankrupt), a general release of the bankrupt and his property will not render the bankrupt a competent witness for the defendants, they having still a right, in the event of a verdict passing against them, to resort to his estate in the hands of his assignees, in the surplus of which the bankrupt retains an interest. *Perryman v. Sieggall*, 540
2. A release by the bankrupt of his interest in the surplus would, it seems restore his competency. *Ibid.*

REPLEVIN.

See PLEADING, III.

SCIRE FACIAS. 805

REQUESTS, COURT OF.

See INFERIOR COURT.

REVOCATION.

Of Devise.

See DEVISE, III.

RIGHT OF WAY.

Obstruction of.

In case for obstructing a right of way, the plaintiff proved an uninterrupted user for seventeen years. The defendant claimed a right to the soil under a subsequent demise, containing (amongst others) a covenant that the lessee should contribute a rateable proportion of the expense of repairing the fences, paths, ways, &c., used in common with the occupiers of other premises near or adjoining thereto, belonging to the lessor. It appeared that the passage over which the plaintiff claimed a right of way was the only one to which this covenant could apply:—*Held*, that the right of way in the plaintiff was not inconsistent with the demise to the defendant. *Oakley v. Adamson*, 510

RULE TO DECLARE.

See REGULE GENERALES, IX.

SAVINGS' BANK.

Since the statute 9 *Geo.* 4, c. 92, an action at law is not maintainable by a depositor against the trustees of a Savings' Bank: the only mode of adjusting disputes is by reference, as pointed out by the 45th section of that act. *Criep v. Bunbury*, 645

SCIRE FACIAS.

See REGULE GENERALES, XXI.

G G G

SEPARATE MAINTENANCE.

See *BARON AND FEME*, 1.

SET-OFF.

See *PRACTICE*, X.

SHERIFF.

Duties and Liabilities of

1. An undertaking by an attorney to give a bail-bond to the sheriff is contrary to the statute 23 *Hen. 6*, c. 10, and void. *Lewis v. Knight*, 353

2. A mandate was issued by the sheriff of York, directing the bailiff of a liberty within that county to take the defendant on a *ca. sa.* The bailiff took the defendant and carried him to the county gaol, which was out of the liberty. *Semble*, that the placing the defendant in the custody of the sheriff out of the liberty, amounted to an escape in law. *Hepworth v. Sanderson*, 64

3. The sheriff sold goods under a *fiery facias* after a secret act of bankruptcy committed by the debtor, and, after notice of the act of bankruptcy, paid over the proceeds to the execution-creditor, under an indemnity. *Held*, that the assignee might recover the amount from the sheriff in an action for money had and received. *Young v. Marshall*, 110

4. Sheriff, when ruled, to return writ in vacation. 417

And see *PRACTICE*, I. 1.

SHIP AND SHIPPING.

See *INSURANCE*.

1. The plaintiff chartered a ship to the defendant, from London to Madeira, and the Cape of Good Hope, and thence to Bombay, and back to London. Instead of proceeding by the direct and usual course from the Cape of Good Hope to Bombay, the captain made a deviation to the Mauritius, and the de-

fendant's agents at Bombay, in consequence of such deviation, refused to find a cargo. In an action by the owner against the defendant for not loading the ship with a cargo at Bombay, pursuant to the charterparty, it was left to the jury to say whether the deviation was of such a nature and description as to deprive the freighter of the benefit of the contract into which he had entered; and they were told, that, if such was their opinion, the defendant was excused by the act of the plaintiff from furnishing a cargo. The jury having found for the defendant—The Court refused to grant a new trial, holding the direction right. *Freeman v. Taylor*, 182

2. By a charter-party the defendant engaged that his ship should return with all convenient speed to L., and there load a full and complete cargo of salt, and proceed therewith to T., and deliver the same there freight free, and there, or at St. M.'s, load a homeward cargo of fruit. At the time the charter-party was entered into, T. was in a state of blockade, which fact had been notified to Government, and officially communicated to Lloyd's:—*Held*, that the fact of the existence of the blockade was no excuse for the non-performance of the contract by the defendant, and did not render the voyage illegal in its inception. *Mcdeiros v. Hill*, 311

SLANDER.

See *COSTS*, IV. 2.

SPECIAL JURY.

See *PRACTICE*, VI.

STAMPS.

On Mortgage-deed.

A mortgage deed to secure 3,000*l.* and interest, together with all expenses incurred in the execution of the

powers of sale, &c., contained in the deed, and interest thereon, does not require a 25*l.* stamp.

STATUTES.

23 Hen. 6, c. 10.

Attorney's undertaking to give bail-bond, void . . . 353

5 Anne, c. 8.

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6 Anne, c. 23.

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32 Geo. 2, c. 28 (*Lords' Act.*)

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Where prisoner has petitioned the insolvent court . . . 809

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49 Geo. 3, c. 121, s. 14 (*Bankrupt Act.*)

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55 Geo. 3, c. 184, Sched. Part 1.

Stamp on a mortgage deed to secure a sum with interest and expenses . . . 230

1 & 2 Geo. 4, c. 78.

Bill of exchange drawn payable at a particular place . . 387

6 Geo. 4, c. c. 16 (*Bankrupt Act.*)

— Who may be bankrupt . 1

— Effect of bankruptcy upon a power of appointment 14

ss. 12, 63. What rights of action pass to the assignees by the assignment . . . 521

s. 52, Proof by a surety . . 542

s. 56, Proof of a debt payable on a contingency . . . 607

s. 59, Election by creditor to prove under the commission . . . 438

s. 72, Proof of debts . . . 615

s. 90, Certificate for costs on notice to dispute the petitioning-creditor's debt, trading, and act of bankruptcy . . . 361

6 Geo. 4, c. 50, s. 25.

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7. Geo. 4, c. 57 (*Insolvent Act.*)

— Liability of insolvent to the claim of a surety who has, after the insolvent's discharge, paid the debt for which he was bound . . . 68

s. 32, What a voluntary assignment within . . . 151

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What a sufficient acknowledgment to take a case out of the statute of limitations . 210

Effect of payment of interest by one of two joint makers of a promissory note . . . 442

9 Geo. 4, c. 15.

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1 Will. 4, c. 22.

Examination upon interrogatories where witness about to go road . . . 223

Where witness ill (pregnant) . 384

1 & 2 Will. 4, c. 58.

(*Interpleader Act.*)

Practice under . . . 156, 158

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STRANDING.

See INSURANCE, III.

SUBPCENA.

Action for disobeying.

See PLEADING, I. 5.

SUPERSEDEAS.

See REGULE GENERALES, XXIII.

SURETY.

One who is discharged under the insolvent debtors' act, 7 Geo. 4, c. 57, is not exonerated from the claim of a surety on a promissory note which became due before the insolvent presented his petition, but which the surety was not called on by the creditor to pay until after the discharge of the principal. *Powell v. Eason*, 68
And see GUARANTEE—RELEASE.

SURPLUSAGE.

See PLEADING, I. 2, II. 2.

TAXATION.

See COSTS, V.

TIME.

How computed. 438

TOLLS.

By prescription.

By a charter of the 31st Elizabeth, her Majesty granted to the inhabitants of T. to be incorporated by the name of "The Mayor and Burgesses of the borough of T.," and also granted and confirmed to the said mayor and burgesses, and their successors, "all mes-

suages, lands, tenements, customs, privileges, immunities, advantages, &c. within the said borough, which the aid mayor and burgesses or inhabitants, by whatever names or name, corporate or incorporate, by reason or colour of any prescription, &c., for fifty years past had held; and that the burgesses and inhabitants of the said borough, and their successors, from thenceforth for ever, *should be free from toll, passage, pontage, murage, &c., anchorage, coyage, wharfage, keyage, &c., for all goods, &c., which were their own, throughout the whole kingdom of England, except the city of London:—Held*, that this exemption from tolls and dues, did not extend to tolls and duties arising and due by prescription to the corporation of T. within that borough.

TRANSPORTATION.

See BARRON AND FEME, 2.

TRESPASS.

I. To Personal Property.

In trespass for seizing goods in the possession and apparent ownership of the plaintiff, the defendant cannot set up the title of a third person, to defeat the action. *Nelson v. Cherrill*
452

II. To Real Property.

In trespass for breaking and entering the plaintiff's close, the defendant pleaded that he was the owner of a certain barn, &c., then standing and being in and upon the close of the plaintiff in which, &c., wherefore he entered to pull down, remove, and take them away, &c.:—*Held*, ill, on demurrer, the plea not shewing how the barn, &c., came upon the close of the plaintiff, or that they were not attached to the freehold. *Anthony v. Hancy*
300

TROVER.

Evidence of Conversion.

The defendants had in their possession a boiler belonging to the plaintiffs. The plaintiffs demanded it, and the defendants at first refused to restore it; but afterwards, and before the issuing of the writ, tendered it: *Held*, no conversion. *Hayward v. Seaward.* 459

VARIANCE.

I. *Between Allegation and Proof.*

In trespass against *A. B.* and *C.* for breaking and entering the plaintiff's close, the *locus in quo* was described in the declaration as abutting "towards the north on a close of the said defendant." The evidence was, that it abutted on a close of *A.*:—*Held*, no variance, but a mere ambiguity. *Walford v. Anthony,* 126

II. *Between act etiam and Declaration,* 416

VENUE.

See PLEADING, I. 1.—PRACTICE, XV.
Effect of variance in, 420

VICE-ADMIRALTY COURT.

Decree of, nature of, and how enforced.

Semble, that a decree of a *Vice-Admiralty* Court, called an "interlocutory," is in effect final; and that such a decree, requiring a party to pay a certain sum, may be enforced in the Courts at *Westminster*. *Obicini v. Bligh,* 477

VOLUNTARY ASSIGNMENT.

See INSOLVENT DEBTOR, IV.

WARRANT TO SUE OR DEFEND.

See REGULE GENERALES, I.

WARRANT OF ATTORNEY.

By a person in custody, 425
Entering up judgment on an old warrant of attorney, 425

WARRANTY.

On the Sale of a Horse.

1. In an action for a breach of warranty on the sale of a horse, the purchaser produced the following receipt, signed by the seller—"Received of *A. B.* (the purchaser) 10*l.* for a grey four years old colt, warranted sound in every respect:"—*Held*, that, in the absence of fraud, the warranty was restricted to the soundness of the animal, the age being mere matter of representation or description. *Budd v. Fairmaner,* 74

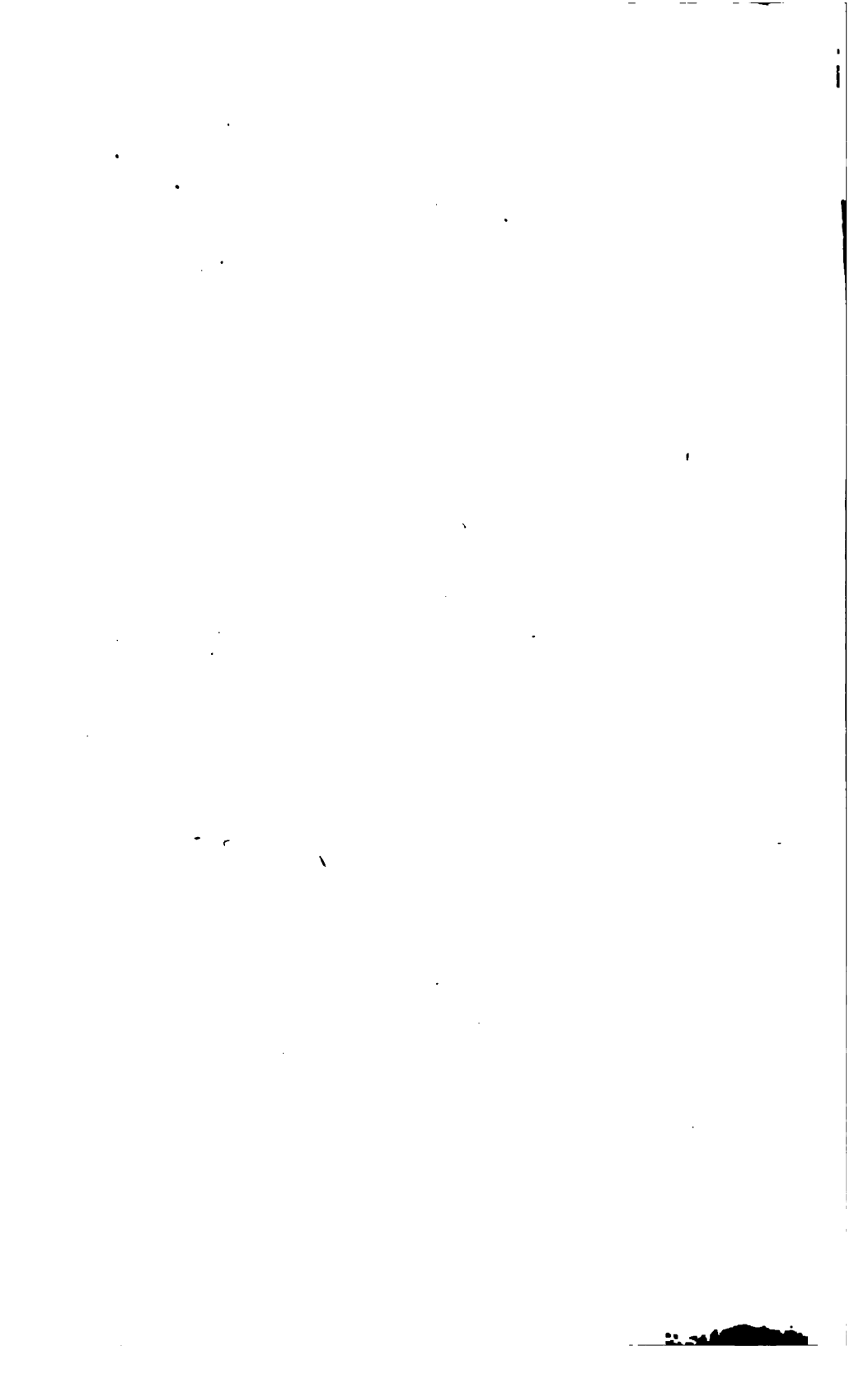
2. The defendant warranted a horse sound wind and limb at the time of the contract. The horse had at that time a splint on the off fore leg, which did not then inconvenience him; but, by reason of its subsequent growth, and consequent pressure upon a sinew, it caused lameness in a few months. In an action for breach of warranty, the jury were directed to say whether or not the horse was unsound at the time of the contract, or, if unsound, whether that unsoundness arose from the splint in question. The jury said, that, although the horse exhibited no symptoms of lameness at the time when the contract was made, he had then upon him the seeds of unsoundness, arising from the splint:—*Held*, that the plaintiff was entitled to a verdict upon this finding. *Margetson v. Wright,* 622

WAIVER.

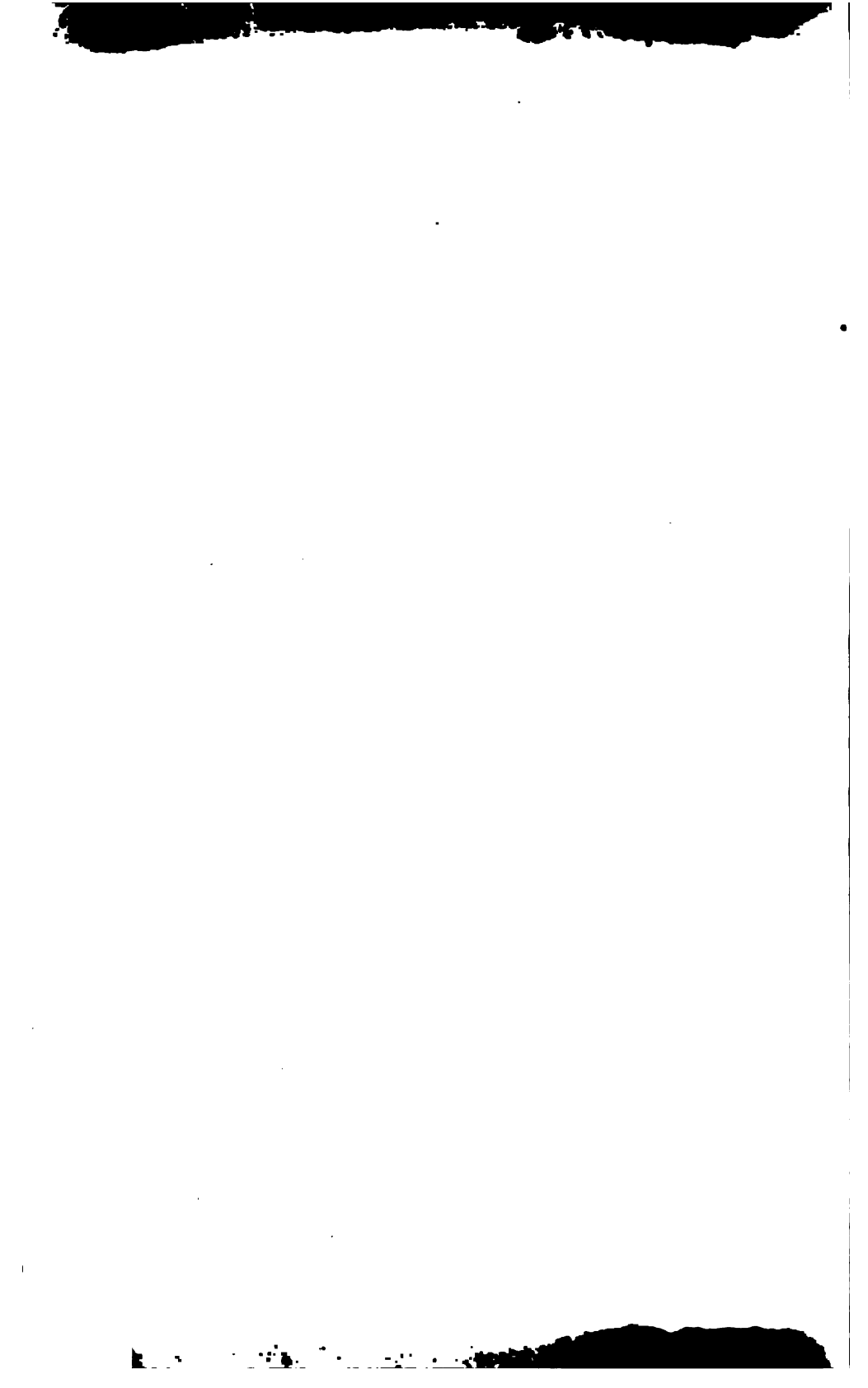
That an affidavit is so framed that paying could not be assigned thereon, is a defect not to be cured by waiver. *Watson v. Walker,* 437

WITNESS.**WILL.***See DEVISE.***WITNESS.***See EVIDENCE.***WRITTEN AGREEMENT.****WRITS.***See PRACTICE.***WRITTEN AGREEMENT.***See EVIDENCE, I. 3.***END OF VOL. I.****LONDON:****W. M'DOWALL, PRINTER, PEMBERTON-ROW,
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